TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~474.~~ 259

IRA G. FRENCH, PLAINTIFF IN ERROR,

vs.

THOMAS EDWARDS, W. T. CAROTHERS, SAMUEL ENESTI, ANTONIO DE SILVA, DAVID MOREL, SAMUEL O'NESS, LEONARD HOYT, JEFFERSON LAKE, W. W. CROUSE, L. M. LINCOLN, ANDREW CAROTHERS, AND R. SHERBURN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED AUGUST 20, 1870.

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THOMAS EDWARDS, W. T. CAROTHERS, SAMUEL ENESTI, ANTONIO DE SILVA, DAVID MOREL, SAMUEL O'NESS, LEONARD HOYT, JEFFERSON LAKE, W. W. CROUSE, L. M. LINCOLN, ANDREW CAROTHERS, AND R. SHERBURN.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth circuit and district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Ira G. French, plaintiff in error, and Thomas Edwards, W. T. Carothers, J. T. Carothers, Samuel Onesti, Antonio de Silva, David Morel, Samuel O'Ness, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. M. Lincoln, Andrew Carothers, and R. Sherburn, defendants in error, a manifest error hath happened, to the great damage of the said Ira G. French, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the first Monday of December next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twelfth day of April, A. D. 1870, and of the independence of the United States the ninety-fourth.

[SEAL.] GEO. E. WHITNEY,
Clerk of the U. S. Circuit Court District of California.

The above writ of error is hereby allowed.

LORENZO SAWYER,
Circuit Judge.

The answer of the judges of the circuit court of the United States for the district of California.

The record and proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at *at* the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

GEO. E. WHITNEY, *Clerk.*

2 *Complaint.*

In the circuit court of the United States in and for the northern district of California, November 8, 1866.

IRA G. FRENCH, PLAINTIFF, *vs.* THOMAS EDWARDS, L. LINCOLN, L. HOYT, W. W. Crouse, Huntoon, Crowell, Mrs. Buckmaster, Mrs. S. Hall, Mrs. E. Lake, E. Paine, A. Carothers, T. Carothers, W'm Carothers, D. E. Hastings, R. Sherburn, F. Davis, W. Tildon, H. B. Gales, Cook, J. Lake, F. Windrick, Antone , Joseph , David Morel, John Doe, Richard Roe, James Jackson, Peter White, John Brown, John Smith, and John Roe, defendants.	Complaint in ejectment.

The plaintiff, Ira G. French, a citizen and resident of the State of New York, by S. F. and S. J. Reynolds, his attorneys, complains of the above-named defendants—all citizens of the State of California aforesaid—and, for cause of action, avers that, on the first day of March, 1862, he, the said plaintiff, was the owner in fee-simple, and was seized in his own right in fee-simple absolute, and was then and still is, as such owner, entitled to the possession of the following-described tract

3 and parcel of land, situated in the town of Sutter, county of Sacramento, and State of California, bounded on the north, east, and south by lands formerly granted by the Mexican government to one John A. Sutter, and on the west by the Sacramento River; commencing at the corner of Main and Water streets of said town of Sutter, at the east bank of said Sacramento River; running thence, in a northerly direction, up and along said river one-half of a mile; thence in an easterly direction one mile; thence southerly, at right angles, one-half mile; and thence westerly, at right angles, one mile, to the place of beginning, being one-half of the original surveyed town of Sutterville, formerly so called, now called Sutter, and being the same tract of land conveyed by said John A. Sutter to one L. W. Hastings on the 30th of November, 1849, said premises being a part of the land granted to the said John A. Sutter under the name of "New Helvetia," and containing 320 acres.

And the plaintiff further says that, being so seized of the said premises as aforesaid, the said defendants afterwards, to wit, on the said first day of March, 1862, unlawfully entered into and upon said premises, and they have ever since and do now unlawfully withold from the plaintiff the possession thereof, to his damage twenty thousand dollars.

4 And the plaintiff further says that he is a citizen of the State of New York and resides in said State, and that the defendants are all citizens of the said State of California.

The plaintiff further says that the Christian names of Huntoon, Crowell, Cook, and Mrs. Buckmaster are unknown to him, as also the full names of the defendants Antone and Joseph, and that the names John Doe, Richard Roe, James Jackson, Peter White, John Brown, John Smith, and John Roe are fictitious names, representing defendants, whose real names are unknown to the plaintiff. And the plaintiff prays that the real and full names of all the defendants may be inserted when ascertained.

And the plaintiff further says that the value of the use and occupation of said premises since said first day of March, 1862, is the sum of twenty thousand dollars.

Wherefore said plaintiff prays that he may recover possession of said lands and have judgment for the restitution of said lands and premises, and that he may recover the sum of twenty thousand dollars as damages for witholding the same from him as aforesaid, and for the rents and profits thereof, besides costs.

S. F. & J. REYNOLDS,
Attorneys for Plaintiff.

(Endorsed:) Filed November 8, 1860.

GEO. C. GORHAM, *Clerk*,
By S. NEALL, *D. C.*

5 *Summons.*

UNITED STATES OF AMERICA:

In the circuit court of the United States in and for the northern district of California.

IRA G. FRENCH, PLAINTIFF,
v.
THOMAS EDWARDS ET AL., DEFENDANTS.

Action brought in the said circuit court and the complaint filed in the city and county of San Francisco in the office of the clerk of said circuit court.

The President of the United States of America greeting to Thomas Edwards, L. Lincoln, L. Hoyt, W. W. Crouse, Huntoon, Crowell, Mrs. Buckmaster, Mrs. S. Hall, Mrs. E. Lake, E. Paine, A. Carothers, T. Carothers, W'm Carothers, D. E. Hastings, R. Sherburn, F. Davis, W. Tildon, H. B. Gales, Cook, J. Lake, F. Windrick, Antone , Joseph, David Morell, David Morell, John Doe, Richard Roe, James Jackson, Peter White, John Brown, John Smith, and John Roe:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States for the northern district of California and to file your plea,
6 answer, or demurrer to the complaint filed therein, (a copy of which accompanies this summons,) in the office of the clerk of said court, in the city and county of San Francisco, within ten days (exclusive of Sundays and day of service) after the service on you of this summons, if served in this county, or, if served out of this county, then within forty days, or judgment by default will be entered against you.

The said action is brought to recover the possession of 320 acres of land in the town of Sutter, county of Sacramento, and State of California, part of land granted to John A. Sutter, by the name of "New Helvetia," and $20,000 damages for witholding the same, and for rents and profits, besides costs; and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

U. S. CIRCUIT COURT SEAL, NOR. DIST. OF CAL.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this 8th day of November, in the year of our Lord one thousand eight hundred and sixty-six, and of our independence the 91st.

GEO. C. GORHAM, *Clk*,
By S. NEALL, *D. C.*

[U. S. int. rev. stamp, c 50. Passage ticket. Cancelled.]

7 (Endorsed:)

U. S. MARSHAL'S OFFICE, *District of California:*

I hereby certify that, on the 10th day of November, A. D. 1866, I received the within summons, and, on the 13th day of November, A. D. 1866, personally served the same by delivering to W. W. Crouse, Jefferson Lake, Frank Davis, Edward Payne, Frank Hoyt, J. W. Tilden as W. Tilden, L. Lincoln, Antone Reiff as Antone, J. Crowell as Crowell, Cha's Devato as John Doe, O. Bostineas, D. Morrell, W. Carothers, D. E. Hastings, R. Sherborne, Mrs. E. Lake, Mrs. Buckmaster, John A. Cook as Cook, Tho's Edwards, Thomas Carothers, Mrs. Sarah Hall as Mrs. S. Hall, H. B. Gales, Huntoon as James Jackson, Austin Alta as John Brown, Samuel Aness as John Smith, and A. Carothers, said defendants, personally, in the county of Sacramento, a copy of said summons attached to a certified copy of the complaint.

San Francisco, March 2d, 1867.

CHA'S W. RAND, *U. S. Marshal,*
By A. C. TAYLOR, *Dep'y.*

8 *Separate answer of Samuel Onesti.*

In the circuit court of the United States in and for the northern district of California.

IRA G. FRENCH, PLAINTIFF,
v.
SAMUEL ONESTI, (WHO IS SUED BY THE NAME of James Jackson,) impleaded with Thomas Edwards, L. Lincoln, and others.

Now comes the said defendant Samuel Onesti, (who is sued by the name of James Jackson,) and, for his separate answer to the complaint of the said plaintiff filed in said cause, answers as follows:

1st. He denies each and every allegation in the said complaint contained.

2nd. And, for a further and other answer to said complaint, this defendant denies that the said Ira G. French is a citizen or resident of the State of New York, or was a citizen or resident of the State of New York at the time of the commencement of this suit.

And he denies that said defendants are all citizens of the State of California, or were all citizens of the State of California at the time of the commencement of this suit.

9 This defendant denies that he is a citizen of the State of California. He denies that on the first day of March, 1862, (or ever at any time,) he, the said plaintiff, was the owner in fee-simple, (or the owner in any manner or degree whatsoever,) or that he was seized in his own right, (or in the right of any person,) in fee-simple, absolute, (or in any manner or degree whatsoever,) or was then, or still is, as such (supposed) owner, entitled to the possession of the lands described in said complaint, or any part of said lands.

And this defendant denies that the said defendants, or either or any of them, afterwards, to wit, on the said first day of March, 1862, (or ever at any time,) unlawfully (or otherwise) entered into or upon said premises, (or any part thereof,) or have ever since, (or at any time,) or do now, unlawfully (or otherwise) withold from the plaintiff the possession thereof, (or any part of the same,) to his (the plaintiff's damage) twenty thousand dollars, (or any sum whatever.)

And this defendant denies that the value of the use and occupation (or use and occupation) of said premises since said first day of March, 1862, (or since any other date,) is the sum of twenty thousand dollars, (or any other sum whatever.)

3rd. And for a further and separate answer to said complaint
10 this defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, this defendant, because he says that neither the said plaintiff, his ancestors, predecessors in interest, nor grantors, was or were seized or possessed of the lands or premises described in the said complaint (or any part of said lands or premises) within five years next immediately preceding the commencement of this suit; and this he is ready to verify. Therefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against this defendant.

4th. And, for a further and other answer to said complaint, this defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against this defendant, because he says that neither the said plaintiff, his ancestors, predecessors in interest, nor grantors was or were seized or possessed of the lands or premises described in said complaint (or any part of said lands or premises) within two years next immediately before the commencement of this action; and this he, this defendant, is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against this defendant.

11 And for a further and separate answer to that part of said complaint which claims damages for the detention of said land prior to the 8th day of November, A. D. 1864, this defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against this defendant for the supposed damages last above described, because he says that the same did not, nor did any part thereof, accrue within two years next immediately before the commencement of this suit; and this he, this defendant, is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against this defendant for the said supposed damages last aforesaid.

Wherefore this defendant prays for a separate verdict and judgment and to be hence dismissed with his costs.

JAMES McCABE,
Att'y for def't Feorri Onesti.

(Endorsed:) Filed Dec. 12th, 1866.
GEO. C. GORHAM, *Clk*,
By DAN'L T. SULLIVAN, *Deepu'y.*

12 *Separate answer of W. T. Carothers and J. T. Carothers.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
W. T. CAROTHERS AND J. T. CAROTHERS, impleaded with Thomas Edwards et als.

W. T. Carothers and J. T. Carothers, defendants in the above-entitled action, impleaded with Thomas Edwards and the other defendants, come by their attorney, Thompson Campbell, and for their separate

answers to the complaint in the above-entitled action say that they are not guilty of the trespass and ejectment mentioned in the plaintiff's complaint.

Wherefore they pray judgment of the said plaintiff and for the costs of suit.

THOMPSON CAMPBELL,
Att'y for Def'ts.

(Endorsed:)
Service admitted.

REYNOLDS.

Filed M'ch 16, '67.

G. C. GORHAM, *Clk*,
P'r WHEELER, *Deep.*

13 *Separate answer of Thomas Edwards.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
v.
THOMAS EDWARDS, IMPLEADED WITH JEFFERSON LAKE ET ALS.

Thomas Edwards, one of the defendants in the above-entitled cause, impleaded with Jefferson Lake and the other defendants, comes, by his attorney, Thompson Campbell, and, for his separate answer to the complaint in the above-entitled action, says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint, and he denies each and every allegation of said complaint.

And, for a further and separate defense, says that at the time of the suing out of this writ in this action and before that time, to wit, on the first day of March, A. D. 1862, the defendant was, and ever since has been, and now is, seized, as owner in fee and entitled to the possession of, the following described parcels or lots of ground, being a part of the premises described in plaintiff's complaint and which is bounded and described as follows: Lot number ten on the map and plan of the
14 town of Sutter, drawn by C. W. Coote, July 1st, 1850, being a certain original lot of 80 by 160 feet. And he avers that he does not occupy any other part or parcel of the premises described in said plaintiff's complaint.

For a counter-claim to the alleged cause of action for damages for the value and occupation of said premises, the said defendant alleges that at the time of the commencement of this action he was holding the premises so described and occupied by him as aforesaid, under color of title in good faith and adversely to the claims of the said plaintiff, and that while so holding said premises he made permanent and valuable improvements on the same, to wit, of the value of five hundred dollars, which said amount the defendant claims to recover by way of counter-claim of the said plaintiff's demand, to the extent that may be proved against him on the trial of this action, and asks judgment against the plaintiff for the excess.

For a further counter-claim to the plaintiff's alleged cause of action for damages, the said defendant alleges that during the time he so held and occupied said premises he paid delinquent taxes that were levied on said premises and on the improvements thereon to the amount of one hun-

dred dollars, which last-mentioned amount, together with interest
15 thereon at the rate of five per cent. per month from the date of the payment of such taxes until the commencement of this action, this defendant claims shall be deducted from the amount that may be proved against him on the trial of this action.

The said defendant, further answering, says that the plaintiff's right to recover any sum as damages for the use and occupation of the premises so possessed and occupied by the said defendant as aforesaid prior to the 14th day of November, A. D. 1863, is barred by the statute of limitations of the said State of California, and which statute is by the said defendant plead in bar of the plaintiff's right to recover damages against the said defendant.

And, for a further and separate defense, the defendant avers that neither the plaintiff, his ancestors, predecessors, or grantors, was possessed or seized of that portion of the premises described in the complaint as occupied and possessed by the said defendant as hereinbefore particularly described and set forth within five years before the commencement of this action.

Wherefore the said defendant prays judgment against the said plaintiff and for his costs of suit.

THOMAS CAMPBELL,
Att'y for Def't.

(Endorsed:)
Service admitted.

REYNOLDS.

Filed M'ch 16, 1867.

G. C. GORHAM, *Clk*,
P'r WHEELER, *Dep.*

16 *Separate answer of A. De Silva, David Morel, and Samuel O'Ness.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
ANTONIO DE SILVA, DAVID MOREL, AND SAMUEL O'NESS, impleaded with Thomas Edwards et als.

Antonio De Silva, David Morel, and Samuel O'Ness, defendants in the above-entitled action, impleaded with Thomas Edwards and the other defendants, come, by their attorney, Thompson Campbell, and, for their separate answer to the complaint in the above-entitled action, says that they are not guilty of the trespass and ejectment mentioned in plaintiff's complaint.

Wherefore the said defendants pray judgment against the said plaintiff and for their costs of suit.

THOMPSON CAMPBELL,
Att'y for Def'ts.

(Endorsed:)
Service admitted.

REYNOLDS.

Filed M'ch 16, '67.

G. C. GORHAM, *Clk*,
P'r WHEELER, *Dep.*

17 *Separate answer of A. Carothers.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
ANDREW CAROTHERS, IMPLEADED WITH THOMAS Edwards et al.

Andrew Carothers, one of the defendants in the above-entitled action, impleaded with Thomas Edwards and the other defendants, comes by his attorney, Thompson Campbell, and, for his separate answer to the complaint in the above-entitled action, says, that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint.

And, for a further and separate defense, the said defendant says that at the time of the suing out of this writ in this action, and before that time, to wit, on the 12th day of May, A. D. 1866, the defendant was, and ever since has been, and now is, seized as owner in fee and entitled to the possession of, the following described parcel or lot of ground, being a part of the premises in plaintiff's complaint, said tract being particularly located and described on a certain plat made on the 9th day of March, 1867, of the tract of land known as the Hastings,
18 or Vance tract, by A. G. Winn, the said tract being marked on said plat, (A. Carothers,) and containing about 13 acres, more or less. And he avers that he does not occupy any other part or parcel of the premises described in said plaintiff's complaint.

Wherefore the said defendant prays judgment of the said plaintiff, and for his costs of suit.

THOMPSON CAMPBELL,
Att'y for Def'ts.

(Endorsed:)
Service admitted.

REYNOLDS.

Filed M'ch 16, '67.

G. C. GORHAM, *Clk*,
P'r WHEELER, *Dep.*

19 *Separate answer of L. M. Lincoln.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
L. M. LINCOLN, IMPLEADED WITH THOMAS Edwards et als.

L. M. Lincoln, one of the defendants in the above-entitled cause, impleaded with Thomas Edwards and the other defendants, comes, by his attorney, Thompson Campbell, and, for his separate answer to the complaint in the above-entitled action, says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint, and he denies each and every allegation of said complaint.

For a counter-claim to the alleged cause of action for damages for the value and occupation of said premises, the said defendant alleges that

at the time of the commencement of this action he was holding the premises under color of title adversely to the claims of the said plaintiff, in good faith, and that while so holding he made permanent and valuable improvements on said premises so held and occupied by him as aforesaid, of the value of two hundred dollars; which said amount this defendant claims to recover by way of counter-claim of the said
20 plaintiff's demand, to the extent that may be proved against him on the trial of this action, and asks judgment the plaintiff for the excess.

The said defendant, further answering, says that the plaintiff's right to recover any sum as damages for the use and occupation of the premises in the said complaint mentioned, prior to the 14th day of November, 1863, is barred by the statute of limitations of the said State of California, and which statute is by the said defendant plead in bar of the plaintiff's right to recover damages against the said defendant.

Wherefore the said defendant prays judgment against the said plaintiff and for his costs of suit.

THOMPSON CAMPBELL,
Att'y for Def't.

(Endorsed:)
Service admitted.

REYNOLDS.

Filed M'ch 16, '67.

G. C. GORHAM, *Clk*,
P'r WHEELER, *Dep.*

21 *Separate answer of W. W. Crouse.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
W. W. CROUSE, IMPLEADED WITH THOMAS Edwards et als.

W. W. Crouse, one of the defendants in the above-entitled action, impleaded with Thomas Edwards and the other defendants, comes, by his attorney, Thompson Campbell, and, for his separate answer to the complaint in the above-entitled action, says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint.

And, for a further and separate defense, the said defendant says that at the time of the suing out of the writ in this action, and before that time, to wit, on the first day of March, A. D. 1862, he was, and ever since has been, and now is, seized as owner in fee and entitled to the possession of the following described parcels or lots of land, being part of the premises described in plaintiff's complaint, and which is bounded and described as follows: Bounded on the north by the road leading from Sutterville to the Georgiana slough-road and lands of Fred.
22 Wendrick; on the east by lands of the said Wendrick, and the east line of the land described in plaintiff's complaint; on the south by the government line and lands of Leonard Hoyt, and on the west by a fence, said tract containing in all about sixty acres; also another tract of about two acres situate and lying on the bank of the Sacramento River, on which is a blacksmith's shop and other buildings; and he avers that he does not occupy any other part or parcel of the premises described in said plaintiff's complaint.

For a counter-claim to the alleged cause of action for damages for the use and occupation of said premises, the said defendant alleges that at the time of the commencement of this action he was holding the premises so described and occupied by him as aforesaid, under color of title, in good faith, and adversely to the claims of the said plaintiff, and that while so holding said premises as aforesaid, he made permanent and valuable improvements thereon of great value, to wit, of the value of one thousand dollars, which said amount the defendant claims to recover by way of counter-claim to the plaintiff's demand, to the extent that may be proved against him on the trial of this action, and asks judgment against the plaintiff for the excess.

23 And for a further counter-claim to the plaintiff's alleged cause of action for damages, the said defendant alleges that during the time he so held and occupied said premises, he paid delinquent taxes that were levied on said premises and on the improvements thereon to the amount of two hundred dollars, which last-mentioned amount, together with interest thereon at the rate of five per cent. per month from the date of the payment of such taxes until the commencement of this action, the defendant claims shall be deducted from the amount that may be proved against him on the trial of this action.

The said defendant, further answering, says that the plaintiff's right to recover any sum as damages for the use and occupation of the premises so occupied by the said defendant as aforesaid, prior to the 1st day of March, A. D. 1868, is barred by the statute of limitations of the said State of California, and which statute is by said defendant plead in bar of the plaintiff's right to recover damages against the said defendant.

And, for a further and separate defense, the defendant avers that neither the plaintiff, his ancestors, predecessors, or grantors were possessed or seized of that portion of the premises described in said plaintiff's complaint as occupied and possessed by the said defendant as hereinbefore particularly described and set forth within five years before the commencement of this action.

24

Wherefore the said defendant prays judgment against the said plaintiff and for his costs of suit.

March 16, 1867.

THOMPSON CAMPBELL,
Att'y for Def't.

(Endorsed:)

Service is admitted March 16, 1867.

REYNOLDS.

Filed M'ch 16, 1867.

GEO. C. GORHAM, *Clk*,
P'r WHEELER, *Dep.*

25 *Separate answer of R. Sherburn.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
R. SHERBURN, IMPLEADED WITH THOMAS EDwards et als.

R. Sherburn, one of the defendants in the above-entitled cause, impleaded with Thomas Edwards and the other defendants, comes, by his attorney, Thompson Campbell, and, for his separate answer to the com-

plaint in the above-entitled action, says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint.

And, for a further and separate defense, says that at the time of the suing out of this writ in this action and before that time, to wit, on the 1st day of March, A. D. 1862, the defendant was, and ever since has been, and now is, seized as owner in fee and entitled to the possession of the following described parcel or lot of ground, being a part of the premises described in plaintiff's complaint, and which is bounded and described as follows: Bounded on the north by lands of Lincoln and Lake, on the east by a fence, on the south by D. Hasting's land,
26 and on the west by the Sacramento River, containing in all about twenty-two acres. And he avers that he does not occupy any other part or parcel of the premises described in said plaintiff's complaint.

For a counter-claim to the alleged cause of action for damages for the value and occupation of said premises, the said defendant alleges that at the time of the commencement of this action he was holding the premises so described and occupied as aforesaid, under color of title in good faith, and adversely to the claims of the said plaintiff, and that while so holding said premises he made permanent and valuable improvements thereon, to wit, of the value of two thousand dollars, which said amount this defendant claims shall be deducted from the amount that may be proved against him on the trial of this action, and he asks judgment against the plaintiff for the excess.

And, for a further counter to the plaintiff's cause of action for damages, the said defendant alleges that during the time he so held and occupied said premises so claimed by the plaintiff in his said complaint, he paid delinquent taxes that were levied on said premises, and on the improvements thereon, to the amount of five hundred dollars, which last-mentioned amount, together with interest at the rate of five per cent. per month thereon from the date of the payment of such taxes un-
27 til of this action, the defendant claims shall be deducted from the amount that may be proved against him on the trial of this action.

The said defendant, further answering, says that the plaintiff's right to recover any sum as damages for the use and occupation of the premises so possessed and occupied by the said, as aforesaid prior to the 14th day of November, A. D. 1863, is barred by the statute of limitations of the said State of California, and which statute is by the said defendant plead in bar of the plaintiff's right to recover damages against the said defendant.

And, for a further and separate defense, the defendant avers that neither the plaintiff, his ancestors, predecessors, or grantors were possessed or seized of that portion of the premises described in the complaint as occupied and possessed by the said defendant, as hereinbefore particularly set forth, within five years before the commencement of this action.

Wherefore the said defendant prays judgment against the said plaintiff, and for his costs of suit.

THOMPSON CAMPBELL,
Att'y for Def't.

(Endorsed:)
Service admitted.

REYNOLDS.

Filed M'ch 16, 1867.

G. C. GORHAM, *Clk*,
P'r WHEELER, *Dep.*

28 *Separate answer of Leonard Hoyt.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
LEONARD HOYT, IMPLEADED WITH JEFFERSON Lake et als.

Leonard Hoyt, one of the defendants in the above-entitled action, impleaded with Jefferson Lake and the other defendants, comes, by his attorney, Thompson Campbell, and, for his separate answer to the complaint in the above-entitled action, says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint.

And, for a further and separate defense, the said defendant says that at the time of the suing out of the writ in this action, and before that time, to wit, on the first day of March, A. D. 1862, the defendant was, and ever since has been, and now is, seized as owner in fee and entitled to the possession of the following described parcel of lot of ground, being a part of the premises described in plaintiff's complaint, and which is bounded and described as follows: Bounded on the north by a ditch fence and by land claimed by S. P. Carr and others; on the
29 east by land owned and occupied by Stewart and Lowe; on the south by a ditch fence and by lands of B. C. St. John, and one Tolls; and on the west by the Sutter Lake, enclosing about sixty acres, more or less, and he avers that he does not occupy any other part or parcel of the premises described in said plaintiff's complaint.

For a counter-claim to the alleged cause of action for damages for the use and occupation of said premises, the said defendant alleges that at the time of the commencement of this action he was holding the premises so described by him as aforesaid, under color of title, in good faith, and adversely to the claims of the said plaintiff, and that while so holding said premises he made permanent and valuable improvements on the same of great value, to wit, of the value of one thousand dollars, which said amount this defendant claims to recover by way of counter-claim to the said plaintiff's demand to the extent that may be proved against him on the trial of this action, and asks judgment against the plaintiff for the excess.

And for a further counter-claim to the plaintiff's alleged cause of action for damages, the said defendant alleges that during the time
30 he so held and occupied said premises he paid delinquent taxes that had been levied on said premises, and on the improvements thereon, to the amount of two hundred dollars, which last-mentioned amount, together with interest at the rate of five per cent. per month from the date of the payment of such taxes, until the commencement of this action, the defendant claims shall be deducted from the amount that may be proved against him on the trial of this action.

The said defendant, further answering, says that the plaintiff's right to recover any sum as damages for the use and occupation of the premises so occupied by the said defendant as aforesaid prior to the 14th day of November, A. D. 1863, is barred by the statute of limitations of the said State of California, and which statute is by the said defendant plead in bar of the plaintiff's right to recover damages against the said defendant.

And, for a further and separate defense, the defendant avers that nei-

ther the plaintiff, his ancestors, predecessors, or grantors were possessed or seized of that portion of the premises described in the complaint, as occupied and possessed by the said defendant, as hereinbefore particularly described and set forth, within five years before the com-
31 mencement of this action. Wherefore the said defendant prays judgment of the said plaintiff, and for his costs of suit.

THOMPSON CAMPBELL,
Att'y for Def't.

(Endorsed :)
Service admitted.

REYNOLDS.

Filed M'ch 16, 1867.

G. C. GORHAM, *Clk*,
P'r WHEELER, *Dep.*

32 *Separate answer of J. Lake.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
J. LAKE, IMPLEADED WITH THOMAS EDWARDS et als.

J. Lake, one of the defendants in the above-entitled action, impleaded with Thomas Edwards and the other defendants, comes, by his attorney, Thompson Campbell, and, for his separate answer to the complaint in the above-entitled action, says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint, and he denies each and every allegation of said complaint.

And, for a further and separate defense, says that at the time of the suing out of the writ in this action, and before that time, to wit, on the first day of March, A. D. 1862, the defendant was, and ever since has been, and now is, seized as owner in fee and entitled to the possession of about 149 acres of the premises described in the said plaintiff's complaint, and the part occupied and possessed by said defend-
33 ant is bounded and described as follows:

Beginning on Bur's southwest corner, thence west 165 rods to a stake on the west margin of Tule Lake; thence back to first station; thence north with Bur's western boundary line 58 rods to his northwest corner, from which a large, lone, white-oak tree bears W. 81° 15′ west, and a large stump of an oak tree which bears S. 84°; thence continuing same course 175 rods to a stake at Lathrop's west boundary; thence west 115 rods to a stake in the Tule of a lake, to the place of beginning, containing one hundred and forty-nine acres of land. Also the following described lots of land in the town of Sutter, and known as lots numbered eleven and twelve in block 178. And he avers that he does not occupy or possess any other part or parcel of the premises described in said plaintiff's complaint.

For a counter claim to the alleged cause of action for damages for the value and occupation of said premises, the said defendant alleges that at the time of the commencement of this action he was holding the premises so described and occupied by him as aforesaid, under color of title in good faith, and adversely to the claims of the said plaintiff, and that while so holding said premises he made permanent and val-

34 uable improvements on the same of the value of five hundred dollars, which said sum this defendant claims to recover by way of counter-claim of the said plaintiff's demand, to the extent that may be proved against him on the trial of this action, and asks judgment against the plaintiff for the excess.

For a further counter-claim to the plaintiff's alleged cause of action for damages, the said defendant alleges that during the time he has held and occupied said premises, he has paid delinquent taxes that were levied on said premises and on the improvements thereon, to the amount of one hundred dollars in gold coin of the United States, which last-mentioned amount, together with interest thereon at the rate of five per cent. per month from the date of the payment of such taxes until the commencement of this action, the defendant claims shall be deducted from the amount that may be proved against him on the trial of this action.

The said defendant further answering says, that the plaintiff's right to recover any sum as damages for the use and occupation of the premises so possessed and occupied by the said defendant as aforesaid, prior to the first day of March, A. D. 1863, is barred by the statute of limi-
35 tations of the said State of California, and which statute is by the said defendant plead in bar of the plaintiff's right to recover damages against the said defendant.

Wherefore the said defendant prays judgment against the said plaintiff, and for his costs of suit.

THOMPSON CAMPBELL,
Att'y for Def't.

(Endorsed:)
Service is admitted.

REYNOLDS.

Filed M'ch 16, '67.

G. C. GORHAM, *Cl'k,*
P'r WHEELER, *Dep'y.*

36 At a stated term of the circuit court of the United States of America for the district of California, held at the court-room in the city of San Francisco, on the 3d day of April, in the year of our Lord one thousand eight hundred and sixty-seven.

Present: The Honorable M. P. Deady, district judge.

Verdict of the jury.

IRA G. FRENCH
v.
THO'S EDWARDS ET AL.

And now at this day come the parties, by their respective attorneys, and this cause being argued by counsel is submitted, and the jury being charged by the court, render their verdict in the words and figures following, to wit:

"We, the jury, find for the defendants."

37 *Bill of exceptions.*

In the circuit court of the United States, district of California.

IRA G. FRENCH, PLAINTIFF,
vs.
THOMAS EDWARDS AND OTHERS, DEFENDANTS. } Bill of exceptions.

Be it remembered that at this February term, 1867, of the said court, holden in and for the district of California, at the city and county of San Francisco, on the 2d, 3d, and 4th days of April, 1867, this action above entitled came on and was tried before said court, the Hon. M. P. Deady presiding. And a jury having been duly empanelled to try the issues joined therein, the said plaintiff to maintain the issues on his part introduced and read in evidence a patent issued by the government of the United States to John A. Sutter, bearing date the 20th day of June, A. D. 1866, based upon a grant of a tract of land including the premises described in the complaint in this action, made to the said John A. Sutter by the Mexican government, on the 18th day of June, A. D. 1841, which grant was on the 8th day of March, 1852, duly presented to the commissioners to ascertain and settle the private land claims in the State of California, and afterwards duly confirmed by said
38 commissioners, and which confirmation was afterwards duly affirmed by the United States district court for the northern district of the State of California, and by the Supreme Court of the United States.

The plaintiff then introduced and read in evidence several mesne conveyances by which the said premises in controversy were conveyed from said John A. Sutter to one Robert H. Vance, prior to the first day of March, 1862. The plaintiff introduced and read in evidence a deed of conveyance, conveying the same premises from said Robert H. Vance to the said plaintiff, bearing date on said first day of March, 1862.

It was also admitted that the defendants who had appeared in this cause were in possession of said premises at the time of the commencement of this action, and at the time of said trial.

The said defendants, for the purpose of proving the title out of the said plaintiff at the commencement of this action, offered in evidence certain documentary evidence as follows:

First. Certified copies of certain papers on file in the office of the clerk of the district court of the sixth judicial district of the State of California, for Sacramento County, which are in the words following, to wit:

39 "The case mentioned in the annexed sum*su*mons having been duly referred to the court commissioner in and for said county, to hear and determine for the information of the court all questions of fact involved therein, the undersigned finds the following facts:

"That there are due from the defendant to the plaintiff,

	$
"State tax	113 75
"County tax	17 06
"District attorney fees	5 20
"Clerk's fees	1 14
"Court tax	
"Sheriff's fees	6 00
"Court commissioner's fees	7 50
"Printer's costs	75
"Auditor's fees	
"Total	

"And duly reports by drafting the form of decree for said case in ——————— Tax Decree Book F, page 202.

"Court Commissioner's Office, Sacramento, Oct. 3d, 1865.

"E. B. CROCKER,
"*Court Commissioner.*"

"STATE OF CALIFORNIA, *County of Sacramento, ss:*

"M. M. Estee, being duly sworn, deposes and says that he is
40 district attorney of said county; that on the 20th day of June, 1865, a certified copy of the annexed summons in this case (which summons is hereby made a part of this affidavit) was duly posted at the court-house in said county, and on the same day a notice was given by him, stating that said summons was issued out of the district court of the sixth judicial district, and containing a description of the property described in said summons, and stating and briefly denoting by figures the amount of taxes and the year of its assessment set forth in said summons, and notifying all owners and claimants of any rights, title, or interest in the property described in said summons, to appear in the said court in the city of Sacramento, in said State and county, within eight weeks from the date aforesaid, and answer the complaint filed in the cause against said property, or that judgment would be rendered against said property for the sale thereof, and for the relief prayed in said complaint, and said notice was thereupon duly published in the Daily Bee, a newspaper published in said county, once each week, for eight successive weeks, commencing at the date first aforesaid.

"M. M. ESTEE.

"Subscribed and sworn to before me this 18th day of September, 1865, and filed the same day.

"A. C. BIDWELL,
"*County Clerk.*"

41 "In the district court, sixth judicial district, in said county.

"STATE OF CALIFORNIA, *County of Sacramento:*

"THE PEOPLE OF THE STATE OF CALIFORNIA, plaintiffs,
"*vs.*
"R. H. VANCE, DOE NO. 4774, JOHN DOE, Richard Roe, and the Real Estate and Improvements hereinafter described, defendants. } "1864 tax.

"And also the following real estate and improvements, to wit, that certain piece or parcel of land situated in said State and county, known and described as—

"A tract of land beginning at the junction of Main street, of the town of Sutterville, and the Sacramento River; thence running easterly 1 mile; thence northerly ½ mile; thence westerly 1 mile to said river; thence down said river to the place of beginning, in the county of Sacramento, in said State, and all and every part and parcel of the improvements on said lands, defendants.

"The people of the State of California send greeting to each of the above-named defendants, and all owners and claimants of the property above described:

"You are hereby required to appear in an action brought against
42 you by the above named plaintiffs in the district court of the sixth

judicial district of the State of California, in and for the county of Sacramento, and to answer the complaint filed therein (a copy of which accompanies this summons) within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; if served out of this county, but within this judicial district, within twenty days, or if served out of said district, then within forty days, or judgment by default will be taken against you.

"The said action is brought to recover the sum of $113 75 due from said defendants for the State and county taxes levied and assessed A. D. 1864, and damages and the costs of this suit, (of which tax $113 75 was so levied and assessed on the property above described, and is a lien thereon,) and to obtain a decree of the said court for the foreclosure of said lien upon said premises; that the said premises may be sold, and the proceeds applied to the payment of said taxes, damages, and costs, and to obtain execution against said defendants for the payment of the same, and also that all persons claiming any interest, either legal or equitable, in said premises may be barred and foreclosed of all right, title, equity of redemption, and interest therein.

"And if you fail to appear and answer said complaint, as
43 above required, the plaintiff will take default against you, and take judgment for the said sum of $113 75, and the damages and costs aforesaid, and apply to the court for the relief demanded in the complaint.

"Given under my hand and the seal of the district court of the sixth judicial district this 23rd day of Feb'y, in the year of our Lord 1865.

[SEAL.] "A. C. BIDWELL, *Clerk*,
"By J. H. PARNELL, *Deputy Clerk*.

"COUNTY OF SACRAMENTO, *ss*:

"I hereby certify that the foregoing is a true copy of a summons, now in my office, this day by me issued out of said court, in the above-entitled cause.

"Witness my hand and the seal of the district court of the sixth judicial district this day of , A. D. 1865.

" , *Clerk*,
" , *Deputy*.

(Endorsed:) "State and county taxes of 1864. No. . Dis-
44 trict court, 6th judicial district. The People of the State of California vs. R. H. Vance, Doe No. 4774, John Doe, Richard Roe, et al. Summons. Filed this 23d day of Feb'y, A. D. 1865. A. C. Bidwell, clerk. By J. H. Parnell, D. C.

"STATE OF CALIFORNIA, *County of Sacramento*:

"THE PEOPLE OF THE STATE OF CALIFORNIA
"*v.*
"R. H. VANCE, DOE NO. 4774, JOHN DOE, AND Richard Roe, and the Real Estate and Improvements hereinafter described, defendants.

"In district court, sixth judicial district.

"The People of the State of California, by M. M. Estee, district attorney of the county of Sacramento, complain of Doe No. 4774, John

Doe, and Richard Roe, whose real names are to plaintiffs unknown, and who are therefore sued by the fictitious names last aforesaid, and R. H. Vance, and also the following described real estate and improve-
45 ments, to wit, the certain piece or parcel of land situated in said county and State, known and described as a tract of land beginning at the junction of Main street, of the town of Sutervill, and the Sacramento River; thence running easterly 1 mile; thence northerly ½ mile; thence westerly 1 mile to said river; thence down said river to the place of beginning, in the county of Sacramento, in said State, and all and every part and parcel of the improvements on said land; and for cause of action say, that between the first Monday in August, A. D. 1864, in the county of Sacramento, in the State of California, P. R. Beckley, then and there being county assessor of said county, did duly assess and set down upon an assessment roll all the property, real and personal, in said county, subject to taxation; that said assessment roll was afterwards submitted to the board of equalization of said county, and was by said board duly equalized as provided by law; that the said R. H. Vance was then and there the owner of, and that there was duly assessed to him, the above described real estate and improvements upon real estate and certain personal property, to wit:

"Said real estate valued and so assessed at $3,500
"Said improvements valued and so assessed at..... $
"Said personal property valued and so assessed at..... $

"And each of the other personal defendants herein have and
46 claim a title to and interest in said real estate, improvements on real estate, and personal property, and are liable for and in duty bound to pay the taxes herein specified; that on said property there has been duly levied for the fiscal year, A. D. 1864—

"A State tax of..... $43 75
"A county tax of..... $70 00
"Swamp land district No. 2, tax ..... $

"Amounting in the whole to $113 75

"All of which is due and unpaid, of which amount, $113 75, was duly assessed and levied against the real estate aforesaid, and $ against the improvements aforesaid.

"Wherefore said plaintiffs pray judgment against said persons, defendants herein, for the sum of $113 75, and separate judgment against said real estate and improvements for the sum of $113 75, and that said real estate and improvements be sold to satisfy such separate judgment, and that all the interest and claim of each person aforesaid, defendants herein, and all persons claiming any interest in said real estate improvements, be forever barred and foreclosed; and that said taxes, and all costs subsequent to the assessment of said taxes, and all costs and expenses of this suit, be paid in gold and silver coin of the United States and plaintiffs pray for such other judgment as to justice belongs.

"DISTRICT ATTORNEY,
"*County of Sacramento.*

47 "STATE OF CALIFORNIA, *County of Sacramento, ss:*

"M. M. Estee, being duly sworn on oath, says that he has the read foregoing complaint and believes it to be true.

"M. M. ESTEE,
"*Dist. Attorney.*

"Subscribed and sworn to before me this 23d day of February, A. D. 1865.

"A. C. BIDWELL, *Clerk*,
"By J. H. PARNELL, *D. C.*

"And a tract of land beginning a junction of Main street, of the town of Sutterville, and the Sacramento River; thence running easterly 1 mile; thence northerly ½ mile; thence westerly 1 mile to said river; thence down said river to the place of beginning.

"Assessed value of real estate	$3,500
" " improvements	$
" " personal property	$
"Total	$3,500

"*Synopsis of tax.*

"State tax	$43 75
"County tax	$76 00
"Swamp land district No. 2	$
	$113 75

48 "STATE OF CALIFORNIA,
"*City and County of Sacramento, ss:*

"I hereby certify that the above and foregoing is a correct transcript from the assessment roll of the year 1864 of the real property, improvements thereon, and personal property assessed to R. H. Vance, and that the State and county taxes therein were levied, as appears in detail on said assessment roll, and that the same is not marked paid upon said assessment roll.

"In witness whereof I have hereunto set my hand and affixed the seal of office this 20 day of Feb'y, A. D. 1865.

[SEAL.] "JOSIAH HOWEL,
"*County Auditor.*

(Endorsed:) "D. C. No. 4601. State and county tax 1864. No. 4774. The People of the State of California vs. R. H. Vance et al. Complaint filed February 24th, 1865. A. C. Bidwell, clerk, by J. H. Parnell, D. C. M. M. Estee, district attorney.

"In the district court of the sixth judicial district.

"STATE OF CALIFORNIA, *County of Sacramento:*

"THE PEOPLE OF THE STATE OF CALIFORNIA, plaintiffs,
"*vs.*
"R. H. VANCE, DOE 4774, JOHN DOE,
49 Rich'd Roe, and the Real Estate in the county of Sacramento, particularly known and described as a tract of land beginning at the junction of Main street, of the town of Sutterville, and the Sacramento River; thence running easterly 1 mile; thence northerly ½ mile; thence westerly 1 mile to said river; thence down said river to the place of beginning, defendants.

"To recover $113 75 in gold and silver coin of the United States of America for State and county taxes levied in and delinquent for the fiscal year 1864.

"This cause coming on to be heard this 23d day of October, A. D. 1865, and it appearing to the satisfaction of the court that all owners and claimants of the property above described, have been duly summoned to answer the complaint herein, and have made default in that behalf:

"And it further appearing to the satisfaction of the court that the court commissioner to whom the said cause was heretofore referred has ascertained the amount of taxes due herein and the amount of dues of each officer, and has duly reported by drafting this form of decree, specifying therein, as hereinafter set forth, the amount of said taxes, the amount of attorney's fees, and the gross amount of all other costs, and the court being fully advised in the premises, finds:

"District atty's fees..	$17 06
"Clerk's fees.....	5 20
"Court tax.....	1 14
"Sheriff's fees.....	....
"Court com's costs....	6 00
" Witnesses....	....
50 "Printing costs	7 50
Auditor's fees	75

"First. That all the taxes sued for in said complaint were legally levied and assessed.

"Second. That all of said taxes are due and unpaid.

"Third. That of said taxes, the sum of $113 75 was levied and assessed to, on and against the above-mentioned and described real estate.

"Fourth. That the taxes due and unpaid amount to the sum of $113 75, and that there is also due thereon 15 per cent., amounting to $17 06, district attorney's fees, and that the gross sum of all other costs amount to $20 59.

"Fifth. That of said sum of $113 75 so due and unpaid, the sum of $113 75 is a lien on and against the aforementioned and described real estate.

"Sixth. That each of the personal defendants sued herein, by either his real or a fictitious name, has an interest in and to said property, antagonistic to the lien of plaintiffs.

"Seventh. It is therefore ordered, adjudged, and decreed by the court, that plaintiffs do have and recover from and against the said defendants, including said real estate, the sum of one hundred and thirteen
51 $\frac{75}{100}$ (113 75) dollars, in gold and silver coin of the United States of America, together with costs of suit taxed at $37 65, and all accruing costs.

"And it is further ordered and decreed that the above-described real estate, or so much thereof as shall be necessary, be sold by the sheriff of said county, at a public vendue, in accordance with the statute in such case made and provided, and the proceeds applied to the payment of the judgment and all costs, and that the purchaser in due time be let into possession thereof.

(Signed;) "J. H. McKUNE,
"*District Judge.*

"A true copy.

"Witness my hand and seal of office this 9th day of Nov., 1865.
[SEAL.] "A. C. BIDWELL, *Clerk,*
"By J. H. PARNELL, *Deputy Clerk.*

"SHERIFF'S OFFICE, *Dec.* 18, 1865.

"STATE OF CALIFORNIA, *Sacramento County:*

"This certifies that I received the within decree on the 23d day of November, 1865, and after due notice according to law, I did, on this 18th day of December, 1865, in front of the court-house door, sell to L. M. Lincoln, who was the highest bidder, all of the property within described, for the sum of one hundred and seventy-five and $\frac{42}{100}$ dollars, in gold coin.

"JAMES McCLATCHY, *Sheriff,*
"By JA'S E. SMITH, *Deputy Sheriff.*

52 "I received on the within decree, Jan. 27, 1866, as follows:

"Tax	$113 75
"Dis't atty's fee	17 06
"Court cost	10 34
"Commissioner's fee	6 00
"Printing	7 50
"Auditor's fee	75
	$155 40

"M. M. ESTEE, *Dis't Att'y,*
"By A. C. FREEMAN, *Deputy.*

(Endorsed:) "Tax suit, No. 4601. Decree, No. 3074. First series. In the district court, sixth judicial district. The People of the State of California v R. H. Vance, Doe 4774. Copy of decree and order of sale. Filed Feb'y 14, 1866. A. C. Bidwell, clerk. By D. C. Clerk's accruing costs, $4 00."

53 The following certificate signed by the clerk of said district court, and another or different, was annexed to the said copies, viz:

"STATE OF CALIFORNIA, *County of Sacramento, ss:*

"I, E. D. Shirland, county clerk and ex-officio clerk of the district court of the sixth judicial district of the State of California, in and for the county of Sacramento, do hereby certify the annexed copies of complaint, summons, affidavit of publication, commissioner's report, and decree, with the endorsements thereon, to be true and correct as the same now of the record, and on file in my office; and I further certify that the

same constitute all the proceedings had in the within-entitled cause, wherein the people of the State of California were plaintiffs, and R. H. Vance, Doe 4,774, and John Doe and Rich'd Roe were defendants.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 17 day of December, A. D. 1866.

[SEAL.] "E. D. SHIRLAND,

"*Clerk of the court aforesaid,*

"By JOHN H. PARNELL, *Dep. Clk.*"

[Internal rev. stamp, 5-cts., cancelled.]

The said plaintiff objected to the reading in evidence of the said documents, for that the same were irrelevant, immaterial, and in-
54 competent.

And he stated, among others, the following special grounds of objection:

First. That it does not appear that the court ever acquired jurisdiction of the subject-matter therein mentioned, upon which it is claimed said 6th district court adjudicated, nor any of the persons therein named or described or designated; that the summons therein does not appear to have been served; but that it does appear from said documents that said court did not acquire such jurisdiction, and that the summons in said suit therein entitled was not served as required by law.

Second. That if said documents constituted the exemplification of a complete record and judgment roll in said action therein entitled, it could not be introduced without a copy of the delinquent list and assessment roll therein mentioned and referred to, (the defendants not proposing to offer the same.)

Third. That the suit is not against the plaintiff in this cause, and the judgment therein cannot affect the rights of any one not a party to it; that fictitious names can only be used to represent and des-
55 ignate unknown owners when the assessment is made to unknown owners.

Fourth. It appears from these documents that there was no judgment roll in said suit.

Fifth. There is no copy of a judgment among said papers, but only a copy of a copy.

For these and other defects manifest upon the face of said papers, the plaintiff insisted they were not admissable in evidence, but the court overruled each and all said objections, and held and decided that the said papers constituted a duly authenticated copy of the record of a judgment in rem against the lands therein described, and that they were sufficient to authorize the sale of the said premises, and they were thereupon read to the jury. And the said plaintiff then and there duly excepted to said ruling and decision.

The defendants then offered in evidence a certified copy of a paper which was in the same words and figures, and had the same endorsements thereon, and was in every respect exactly like the paper among those last aforesaid which were read to the jury, endorsed "copy of decree and order of sale," to which was attached the following certificate and no other or different, viz:

56 "STATE OF CALIFORNIA, *County of Sacramento, ss:*

"I, E. D. Shirland, clerk of the district court of the sixth judicial district in and for the county of Sacramento, State of California, hereby certify that the above and foregoing is a full, true, and correct copy of the original decree and order of sale in the aforesaid entitled

cause, as the same now remains of record and on file in the office of said court.

"Witness my hand, with the seal of our said court, affixed at the city of Sacramento, the county seat of the county of Sacramento, this 8th day of March, A. D. 1867.

[SEAL.] "E. D. SHIRLAND,
"*Clerk of the court aforesaid.*
"By JOHN. H. PARNELL,
"*Deputy Clerk.*"

[5-cts. stamp.]

To the reading in evidence of which the plaintiff objected, on the ground that the same was irrelevant, immaterial, and incompetent. And the court overruled the said objection, and the same was thereupon read to the jury, to which ruling and decision the said plaintiff then and there duly excepted.

The defendants then offered in evidence a certificate of pur-
57 chase in the words and figures following, to wit:

"*Certificate of purchase.*

"THE PEOPLE OF STATE OF CALIFORNIA
"*vs.*
"R. H. VANCE, DOE 4774, JOHN DOE, RICH'D ROE.

"District court, sixth judicial district, held in and for the county of Sacramento, State of California.

"I, James McClatchy, sheriff of the county of Sacramento, State of California, do as such sheriff hereby certify, that by virtue of a judgment and decree of sale, for State and county taxes, levied for the fiscal year 1864, rendered and docketed in the district court of the sixth juidcial district of said State, held in and for the county of Sacramento, on the 23d day of October, 1865, in favor of the people of the State of California, and against R. H. Vance, Doe 4774, John Doe, Rich'd Roe, and the piece or parcel of land known and described as a tract of land beginning at the junction of Main street of the town of Sutterville and the Sacramento River; thence running easterly 1 mile; thence northerly ½ mile; thence westerly 1 mile to said river; thence down said river to the place of beginning, which said judgment is against said real estate for the sum of one hundred and thirteen $\frac{75}{100}$ dollars, together with $41 65
58 costs, at my reception of the process and all accruing costs, the whole payable in gold coin, by me received on the 23d day of Nov., 1865, commanding me to levy upon the above mentioned and described property, and to cause so much thereof as was necessary to be sold to the purchaser who would take the smallest quantity thereof, and pay the judgment and all costs, I did on the 23d day of Nov'r, 1865, levy upon the said property, and after due notice according to law, I have this day sold at public auction in front of the court-house door of said county, at the hour of eleven o'clock a. m., for the sum of one hundred and seventy-five $\frac{42}{100}$ dollars in gold coin, to L. M. Lincoln, all of the above described property; and said sum of one hundred and seventy-five $\frac{42}{100}$ dollars has been paid to me in gold coin by said L. M. Lincoln, and is the whole consideration by him paid for the last mentioned and described property, and entitles him to this certificate of purchase, which said purchase will become absolute at the expiration of six months, and

the purchaser then be entitled to a conveyance unless the property is redeemed according to law.

"Given under my hand as sheriff as aforesaid, at office in the city of Sacramento, this 18th day of December, 1865.

"JAMES McCLATCHY,
"*Sheriff of the County of Sacramento.*
"By J. R. DRAY, *Deputy Sheriff.*"

[5-cent stamp, cancelled.]

59 To the reading of which, in evidence, the plaintiff objected on the ground that the same was irrelevant and incompetent, and as one of the special grounds of objection, that the sale did not appear to have been made according to the direction of the decree recited in it, or the statute concerning the same. And as a special ground of objection, he stated, among others, that no return of the sheriff making the certificate had been proven. The court overruled the said objections, and the said certificate was read to the jury. To which rulings and decision the plaintiff then and there duly excepted.

The said defendants then offered in evidence a sheriff's deed, in words and figures following; to the reading of which in evidence the plaintiff objected, on the grounds that the same was irrelevant, immaterial and incompetent, for the reasons hereinbefore stated as to the other documents offered in evidence by the defendants, especially that no return of the sheriff had been proven. The court overruled each and all said objections; and the defendants read said deed to the jury. And the plaintiff then and there duly excepted to said ruling and decision. Said sheriff's deed was in the words and figures following, to wit:

"To all whom these presents may come, I, James McClatchy, ex-
60 sheriff of the county of Sacramento, send greeting:

"Whereas, by a decree and order of sale, to me directed, issued out of the clerk's office of the district court of the sixth judicial district of the State of California, in and for the county of Sacramento, upon a judgment recovered in said court on the 23d day of October, A. D. 1865, in favor of the people of the State of California, and against R. H. Vance, Doe. 4774, and that piece or parcel of land situated in the county of Sacramento, State of California, and described as a tract of land beginning at the junction of Main street, of the town of Sutterville, and the Sacramento River; thence running easterly one mile; thence northerly half a mile; thence westerly one mile to said river; thence down said river to the place of beginning, for the sum of one hundred and thirteen $\frac{75}{100}$ dollars for State and county taxes levied for the year 1864, and $41 65 costs of suit and accruing costs, and by me received on the 23d of November, 1865, I was commanded to sell so much of the real estate hereinbefore described as should be necessary to pay said sums, as by the said decree and order of sale, reference thereto being had, will more fully appear:

"And whereas, after receipt of said decree and order of sale by
61 me, and before the day of return thereof, I did, by virtue of the said decree and order of sale, give the legal notice of the time and place of such sale, according to the statute in such case made and provided, and upon the day of such sale, to wit, the 18th day of December, 1865, did sell the land hereinafter more particularly described, to L. M. Lincoln, for the sum of one hundred and seventy-five $\frac{42}{100}$ dollars, he being the highest bidder, and that being the largest sum bid for said property at such sale:

"And whereas, six months have elapsed since the date of such sale,

and the time for redemption having fully expired, and no person has redeemed said premises or any portion thereof:

"Now, therefore, know ye that I, James McClatchy, the ex-sheriff aforesaid, by virtue of the hereinbefore mentioned decree and order of sale, and of the statute in such case made and provided, and in consideration of the aforesaid sum of one hundred and seventy-five $\frac{42}{100}$ dollars, to me in hand paid by the said L. M. Lincoln, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain and sell unto the said L. M. Lincoln, heirs and assigns forever, all that piece or parcel of land lying and being in the county of Sacramento, and State of California, and known
62 and described as a tract of land beginning at the junction of Main street, of the town of Sutterville, and the Sacramento River; thence running easterly one mile; thence northerly half a mile; thence westerly one mile to the said river; thence down said river to the place of beginning; together with the appurtenances: To have and to hold the said land and premises, and every part and parcel thereof, with the appurtenances, unto the said L. M. Lincoln, heirs and assigns forever, as fully and as absolutely as I, the said James McClatchy, as ex-sheriff aforesaid, and under the authority aforesaid, might, could, or ought to convey and sell the same.

"In witness whereof, I, James McClatchy, have as such ex-sheriff hereunto set my hand and seal the 21st day of June, 1866.

"JAMES McCLATCHY, [SEAL.]
"*Sheriff of the County of Sacramento.*"

[Rev. stamp 50 cts., cancelled.]

"STATE OF CALIFORNIA, *County of Sacramento, ss:*

"On this twenty-first day of June, A. D. one thousand eight hundred and sixty-six, before me, Samuel Cross, a notary public in and for said county, duly commissioned and sworn, personally appeared the within-named James McClatchy, ex-sheriff of the county of Sacramento,
63 whose name is suberibed to the annexed instrument as a party thereto, personally known to me to be the individual described in and who executed the said annexed instrument, and acknowledged to me that he, as ex-sheriff aforesaid, executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

"In testimony whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[NOTARIAL SEAL.] "SAMUEL CROSS,
"*Notary Public.*"

The plaintiff also, before the said deed was read to the jury, stated as a further special objection to said deed, that it did not show or state that the sale was made in accordance with the directions of the decree by the authority of which it was claimed to have been made, and that it does not appear from anything offered in connection with said deed that said sale was so made, or as directed by the statute, but that the contrary appears from said deed and the recitals therein, which objections were each and all decided not to be well taken, and plaintiff duly excepted. The plaintiff then offered to prove by competent
64 evidence that the said property, mentioned in said documents offered in evidence by the said defendants, was not assessed according to law, for the fiscal year named in said documents; to which the said defendants objected on the grounds that the record introduced by them was conclusive of that question. And the court sustained the

said objection, and the plaintiff duly excepted to said ruling and decision. The plaintiff also offered to prove by competent evidence that the said defendants, except the defendant L. M. Lincoln, were in the exclusive possession and enjoyment of the said premises before the beginning of the year 1864, and had so continued to enjoy the same ever since then. The defendants objected to the said evidence, for the reason that the same was irrelevant and incompetent, and the court sustained said objection. To which ruling the plaintiff then and there excepted.

The court thereupon, at the request of the defendants, instructed the jury to find a verdict in favor of the said defendants. To which instruction so given the plaintiff then and there duly excepted, because he says instruction should be that the plaintiff is entitled to a verdict.

In testimony whereof, and of the truth of the foregoing bill of
65 exceptions, I, the said judge before whom said cause was tried, have hereunto set my hand and seal this 13th day of April, A. D. 1867.

M. P. DEADY, *Judge.* [SEAL.]

(Endorsed:) Filed April 16, 1867.

GEO. C. GORHAM, *Clk,*
By H. F. LARDNER, *Dep.*

66 *Judgment.*

IRA G. FRENCH
v.
THOMAS EDWARDS ET AL.

Now at this day, this cause coming on to be heard in its regular course upon the calling of the calendar, and a jury of twelve men being duly empanelled, and the parties being present by their respective attorneys, and the testimony and arguments of counsel being heard and the jury charged touching the law, the action was submitted to the jury, who, after due deliberation had, return a verdict in the words and figures following, to wit:

"We, the jury, find for the defendants."

Now, therefore, by reason of the law and the premises, and it appearing that as against all other defendants herein this cause has been heretofore determined, it is now here considered by the court that plaintiff, Ira G. French, take nothing by his action aforesaid as against the defendants, W. T. Carothers, J. T. Carothers, Samuel Onesti, Antonio de Silva, David Morel, Samuel O. Ness, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. M. Lincoln, Andrew Carothers, Thomas Edwards,
67 and R. Sherburn, and that they are not guilty of the trespass and ejectment as charged against them in manner and form as the said plaintiff hath within complained against, and that as against them, the said defendants aforesaid, the action herein be, and the same is hereby, dismissed, and that the said defendants go hence without day, and that they do have and recover from the plaintiff their costs and disbursements in this action to be taxed.

DEADY, *Judge.*

(Endorsed:) Filed Apr'l 26, 1867.

GEO. C. GORHAM, *Clk,*
Per JOHN O. WHEELER, *D. C*

68 *Bond on writ of error.*

Supreme Court of the United States.

IRA G. FRENCH, PLAINTIFF IN ERROR,
v.
THOMAS EDWARDS, W. T. CAROTHERS, J. T. Carothers, Samuel Onesti, Antonio de Silva, David Morel, Samuel O. Ness, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. M. Lincoln, Andrew Carothers, and R. Sherburn, defendants in error. } In error.

Know all men by these presents, that we, Robert H. Vance and John Reynolds, are held and firmly bound unto the above-named defendants in error in the sum of three hundred dollars, to be paid to the said defendants in error, their executors, or administrators. To which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated the 13th day of April, A. D. 1870.

Whereas the above-named Ira G. French hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the
69 judgment rendered in the above-entitled suit by the circuit court of the United States for the ninth circuit, district of California:

Now, therefore, the condition of this obligation is such, that if the above-named Ira G. French shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ROB'T H. VANCE. [SEAL.]
JOHN REYNOLDS. [SEAL.]

Sealed and delivered in the presence of—
(Signed) GEO. E. WHITNEY.

I approve of the form and the amount of the sufficiency of the sureties on the within and foregoing bond.
(Signed) LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit, District of California.

(Endorsed:) Filed 13th April, 1870.
GEO. E. WHITNEY, *Clk*,
By L. S. B. SAWYER, *D. C.*

70 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Thomas Edwards, W. T. Carothers, J. T. Carothers, Samuel Onesti, Antonio de Silva, David Morel, Samuel O. Ness, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. M. Lincoln, Andrew Carothers, and R. Sherburn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held in the city of Washington, District of Columbia, on the first Monday of December, A. D. 1870, pursuant to a writ of error filed in the clerk's office of the circuit

court of the United States, ninth circuit, and the district of California, wherein Ira G. French is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated at San Francisco, California, this 13th day of April, A. D. 1870.

(Signed) LORENZO SAWYER,
Circuit Judge, Ninth Circuit.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Samuel L. Rogers, of the city of Sacramento, in said State, being first duly sworn, deposes and says that he is an attorney of
71 United States circuit court above named; that on the 15th day of April, 1870, he served the foregoing citation upon W. W. Crouse, and on the 16th day of same month on Thomas Edwards and R. Sherburn, and on the 18th of same month on J. Lake, and on the 19th of same month on A. Carothers, W'm T. Carothers, and Samuel Onesti, on the 20th of same month upon L. M. Lincoln and L. Hoyt, and on the 21st of the same month upon J. T. Carothers; that said service was made by delivering to and leaving with each of the persons above named, who are all defendants in error in this case, a true copy of said citation, and showing to each this original, at the said city and in the county of Sacramento.

And this deponent further says, the defendants in error above named not so served as aforesaid, David Morel, Samuel O. Ness, and Antonio de Silva were all residing in said county of Sacramento, at the date of the judgment in this case, and that they have since removed from said county, and as he is informed and believes they have left the State of California and the United States; that said last-named three defendants in error were, at the time of the commencement of this action, and up to the time of their departure from the State as aforesaid, tenants in possession of portions of the demanded premises, holding under other of the defendants in error, who have been served with this citation as aforesaid.

72 And deponent further says that he has been engaged in assisting the attorney for the plaintiffs in error from the first commencement of this case; that Hon. Thompson Campbell, the attorney for the defendants in error, has departed this life since the entry of the judgment in this case.

SAMUEL L. ROGERS.

Sworn and subscribed before me, this 23d day of April, 1870.

SEAL OF THE U. S. CIRCUIT COURT, DIS'T OF CAL'A.

GEO. E. WHITNEY,
Clerk U. S. Circuit Court, Dist. of California.

"I admit due service of a copy of the within citation, this 2d day of May, 1870.

"JAMES McCABE,
"*Att'y for the def'ts in error, as I appeared for.*"

(Endorsed:) File l this 15th May, 1870.

GEO. E. WHITNEY, *Clk,*
By L. S. B. SAWYER, *D. C.*

73 UNITED STATES OF AMERICA,
District of California, ss:

I, George E. Whitney, clerk of the circuit court of the United States, ninth circuit, district of California, hereby certify that the foregoing seventy-two pages, numbered from 1 to 72, both inclusive, are a true transcript of the record and all proceedings in the cause therein entitled, and that the same together constitute the return of the writ of error hereto annexed.

In testimony whereof, I have hereunto set my hand and the seal of said circuit court, at San Francisco, in said district, this 12th day of May, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth.

[SEAL.] GEO. E. WHITNEY, *Clerk.*
By L. S. B. SAWYER, *D. C.*

(Indorsement on cover:) No. 474. Ira G. French, plaintiff in error, vs. Thomas Edwards, W. T. Carothers, Samuel Enesti, Antonio de Silva, David Morel, Samuel O'Ness, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. M. Lincoln, Andrew Carothers, and R. Sherburn. California C. C., U. S.

Filed 20th August, 1870.

REC. 474—4

No. .....

In the Supreme Court

Of the United States.

IRA G. FRENCH,

Plaintiff in Error,

vs.

THOS. EDWARDS et al.

Defendants in Error.

Brief of Plaintiff in Error.

HOUGHTON & REYNOLDS,

Counsel for Plaintiff in Error.

COTTLE & CONMY, STEAM PRINTERS, FIRST STREET, SAN JOSE.

1871.

In the Supreme Court

OF THE UNITED STATES.

IRA G. FRENCH,
PLAINTIFF IN ERROR,

vs.

THOMAS EDWARDS ET AL.,
DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

I.

THE BILL OF EXCEPTIONS WAS PREPARED AND SIGNED IN DUE TIME, AND IS IN PROPER FORM.

The defendants in error have made a technical objection to the bill of exceptions in this case, which, if carried to its logical results, would require a separate bill to be signed and sealed for each exception taken during the progress of the trial. The point, as we understand it, is that the

bill must be in the present tense, and bear date as of the date of the exception. But such is not the rule as declared by this Court.

We understand the rule to be that the bill of exceptions should show that "the exception was taken at the stage of the trial when its cause arose," (16 *How.*, 29.) and that the exception can not be *taken* afterwards. The exception shall appear *nunc pro tunc*—not the date at the foot of the bill, which only shows when the bill was put in form and sealed. It would be impossible to have this date agree with the date of each exception, for in a trial lasting several days an exception may be taken on one day, which would be waived if not *taken* until the next day.

In *Simpson vs. Dall*, 3 *Wallace*, 460-73, the objection to the bill of exceptions was that the *present* tense was used, thus literally showing that the exception was taken not at the time the cause of it arose, but at the date of the signing of the bill. But the exceptions were considered, because it was apparent that the rulings were excepted to in proper time, though "the Judge carelessly used a word in the *present tense* when the true expression of his meaning required the use of a word in the *past tense*." It appears in that case, at p. 469, that the bill of exceptions was not made up and signed until after a motion for new trial had been

made, an exception to which had no place in the record.

In the *United States vs. Breitling*, 20 *Howard*, 252, the bill of exceptions was signed and sealed and bore date (*p.* 253,) more than ten days after the adjournment of the term at which the trial was had, and the exceptions were considered in this Court, notwithstanding it appeared that there was a rule of the Circuit Court adopting the State practice, which provided that no bill of exceptions could be signed after the adjournment of the term.

This Court says, (p. 254): "The attention of this Court has upon several occasions been called to this subject, and the rule established by its decisions will be found to be this: the exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the Judge afterwards. And the time within which it may be drawn out and presented to the Court must depend on its rules and practice, and on its own judicial discretion."

In *Dredge vs. Forsyth*, 2 *Black.*, 263, and *Kellogg vs. Forsyth*, *ib.* 571, the bills of exceptions were questioned on grounds similar to those taken by the defendants in error here. This Court overruled the objections and reiterated the rule stated in *U. S. vs. Breitling*, 20 *How.*, 252.

In the case at bar, the bill of exceptions was

signed and sealed on the tenth day after the trial, and filed at the same term and before the judgment. The record shows that each "exception was taken at the stage of the trial when its cause arose." (*Turner vs. Yates*, 16 *How.*, 29.) The bill of exceptions states, as in *Kellogg vs. Forsyth*, (2 *Black.*, 573,) that "plaintiff then and there excepted." (Trans. fols. 55, 56, 59, 63, 64.)

II.

THE SALE WAS NOT MADE AS PROVIDED BY LAW, AND THE DEED IS NOT EVIDENCE OF TITLE IN THE PURCHASER AT THE SALE FOR TAXES, ASSUMING THE PREVIOUS PROCEEDINGS TO HAVE BEEN REGULAR AS AGAINST THE LAND.

The decree (fol. 51) directs that the sale shall be made in accordance with the Statute in such case made and provided. The Statute (Sec. 45 Stat. 1861, p. 435) under which this sale was made, referred to in the decree for directions, provides that "An Act to regulate Proceedings in Civil Cases in Courts of Justice of this State, and the several amendments thereto, so far as the same are not inconsistent with the provisions of this Act, are hereby made applicable to the proceedings under this act; and any deed derived from a *sale of property under this act*, shall be con-

clusive evidence of title, except as against actual frauds, or prepayment of the taxes by one not a party to the action, or judgment in, or upon which such sale was made, and shall entitle the holder thereof to a writ of assistance from the District Court to obtain possession of such property; *provided*, that the Sheriff, in selling said property, shall only sell the *smallest quantity* that any purchaser will take and *pay the judgment and all costs;* * * * *provided* further, that the real estate so *sold for taxes* may be redeemed from such sale, as in case of sale upon execution, as provided in other civil cases, by paying to the Sheriff the total amount of the *judgment and all costs*, with thirty per cent. thereon. * * * All moneys collected under this act, except costs and charges, shall without delay be paid to the Treasurer of the county, to be distributed to the proper funds."

In *Ferris vs. Coover*, 10 *Cal.*, at page 632, Mr. Justice Field, in delivering the opinion of the Court, says: "By the doctrine of the common law, the party claiming under a tax deed must show that *all* the requirements of the law, from the *first to the last*, have been complied with. The officers of the government, from the assessment of the tax *to the execution of the deed*, are acting under

a special power conferred by the law, and, as in every case of the exercise of a special power, they must keep clearly within the limits of their authority, or there will be no validity to their acts. That rule of the common law has been changed by the Statute in this State. Here the deed itself is *prima facia* evidence of the conveyance of all the right, title and interest owned by the delinquent at the time of sale. The effect of this is to give to the deed the presumption that all the requirements of law have been complied with, by which the title could vest, and to shift the burden of proof from the party who claims under the deed to the party who attacks it. The clause of the Statute does not, however, dispense with the necessity of the officer reciting in the deed the authority under which he executes it. It has no validity as an independent conveyance. Its effect in the transfer of property arises from the power conferred by the Statute, and a *strict compliance with its conditions;* and the deed must bear on its face a reference to that power. If, in reciting the authority for the sale upon which the deed is given, it appears that some *material requisition* of the law has been omitted, the deed is void."

In *Sharpe vs. Johnson*, 4 *Hill*, at page 99, Judge Bronson says: "When lands are to be taken

under a Statute authority, in derogation of the common law, every requisite of the Statute having the *semblance of benefit* to the owner, must be strictly complied with."

In *Stead's Executors vs Course*, 4 *Cranch*, 402, the validity of a tax collector's deed was involved, and *Chief Justice Marshall* delivering the opinion of this Court, at page 414, says: "In examining the law under which this sale was made, the Court perceives that the collector is authorized to sell only on deficiency of personal estate; and then to sell only so much as is necessary to pay the tax in arrear. In this case *a sale is made of a whole tract of land, without specifying the amount of the taxes actually due*, for which that land was liable and could be sold. This is proceeding in a manner not strictly regular. The sale ought to have been of so much of the land as would satisfy the tax in arrear. Should it be true that the land was actually liable for the whole sum for which it sold, it would still be incumbent on the vendee to prove that fact; for it can not be presumed. Every presumption, arising from the testimony in the cause, is against it."

The Sheriff in his deed recites (fol. 61): "And whereas, after receipt of said decree and order of

sale by me, and before the day of return thereof, I did, by virtue of the said decree and order of sale, give the legal notice of the time and place of such sale, *according to the Statute in such case made and provided*, and upon the day of such sale, to wit: the 18th day of December, 1865, did sell the land hereinafter more particularly described to L. M. Lincoln, for the sum of $175 42-100, he being the *highest bidder*, and that being the *largest sum* bid for *said property* at such sale."

These recitals are binding upon the defendants in error, who introduced the deed, and no proof was offered to explain or contradict them, if they could have been permitted to give such evidence. It is said the return of the Sheriff (fol. 51) and the certificate of sale (fol. 58) are to be read in connection with the deed to explain it. But we submit that the recitals of the deed can not be contradicted or explained by the return or certificate of sale. The office of both these latter documents is at an end when the deed is executed, so far as the sale is concerned.

But if we read the other recitals, in connection with those in the deed, they fail to change the result, for neither asserts anything contradictory to the recitals in the deed. The language of the return is, that he sold to L. M. Lincoln, who was

the *highest bidder*, all the land for $175.42 (fol. 51). The certificate recites that the judgment and costs amount to $55.40, and that he sold the land described for $175 42-100, the purchaser being the *highest bidder*, and that being the largest sum bid (fol. 60). And we submit that the construction sought to be put upon this language by the counsel for the defendants in error is as unwarranted, as his suggestion that "probably the deeds (in *Eitel vs. Foote* and *Reily vs. Lancaster*) were of the *same form* and executed by the same Sheriff, but the objection upon which this Court is now invited to pass does not appear to have occurred to the counsel or Court in *Reily vs. Lancaster*" [Deft's Points, p. 17]. If the learned counsel had taken the trouble to examine the records in *Eitel vs. Foote* and *Reily vs. Lancaster*, he would have found that the deeds in both those cases, made by the same Sheriff, McClatchy, upon judgments for taxes levied for Sacramanto county, recited that he sold the property for a stated sum, "that being the *amount of said judgment and costs*, and the best bid therefor, and said land so sold *being the smallest quantity* that any purchaser offered to take and *pay such judgment and costs*." If this Court can draw any inference from these cases, as to the manner of conducting this sale, it is not that suggested by defendants' counsel, but rather that the

Sheriff did not make this sale as the law directs, even if the language of the deed could be forced to sustain such a supposition. But the recitals in the deed are too plain to admit of construction. They mean what they say, that he sold the whole land for the largest sum bidden for it.

Again, it does not appear, from any of the evidence offered, that the amount for which the land was sold, agreed with the amount of the judgment and costs.

It is contended, however, that this was not a sale for taxes, but a Sheriff's sale under a decree, and that he is not therefore held to the same strictness in his proceedings as if he were acting under a Statute. The answer to this proposition is that the decree gives no direction as to the manner of making a sale. It ascertains the liability, and is conclusive, only, as to the questions determined by it. The sale is based upon the decree instead of the assessment roll, but the officer in making the sale is governed by the Statute and not by the decree. The Statute makes no provision that the decree shall contain any such direction.

Statutes 1863–4, p. 399.

" 1861, p. 435. sec. 45.

And whether the sale is made upon a decree for taxes or upon the assessment roll, it is still a sale for taxes, and is to be made in a particular way, and *all the proceeds* are to be paid into the Treasury, and are not under the direction of the Court.

And the redemption is made, not by paying the amount of the bid, but the judgment and costs. The deed recites that the *judgment and costs* amounted to $155 40-100, and that he sold the whole land for $175 42-100. It is not shown by any recital, nor was any attempt made at the trial to show what was done with this $20, nor why it was necessary to sell for more than the amount of the judgment and costs, unless, as the recitals show, he offered the whole property and the bidding ran up to the larger amount. It may be said that, perhaps, there were some accruing costs. The answer is that the amount of those accruing costs must be recited, and it must appear that the amount of such added costs was stated at the sale. If it were not necessary to show it by recital, then clearly it should be proven at the trial.

4 *Cranch*, 414.

III.

NO JUDGMENT ROLL WAS INTRODUCED TO SUPPORT THE DEED. NOTHING LESS THAN A COMPLETE RECORD IMPORTS VERITY.

When a judgment roll is introduced, the recitals in the decree are proof. And if it is necessary, it will be presumed that other evidence than that contained in the roll was introduced to support those recitals, unless such presumption is contradictory to the facts established by the record. But unless the whole record is introduced, certified to be the roll, it may be that papers are omitted which would contradict those recitals.

Hahn vs. Kelly, 34 *Cal.*, 391–424.
Eitel vs. Foote, 39 *Cal.*, 439.
Mason vs. Wolf, Oct. Term Sup. Court of California, 1870.

The detached papers introduced did not constitute a judgment roll.

Cal. Prac. Act, Sec. 203.
Stat. of 1863-4, *p.* 400, *Sec.* 1; *ib. p.* 401, *Sec.* 4.

The learned counsel for defendants in error treats the deed as the culmination of a proceeding *in rem*, and seems to concede that all the proceedings from the commencement of the action to the complete execution of the decree, by the sale and deed, must be in exact conformity to the Statute authorizing them. But the decree, being the Sheriff's authority to sell, standing alone, he concludes that it is not necessary to introduce anything more than the decree to support the deed. But it will be found, by reference to the Statute, that the roll is to be made up immediately *after* the sale, and that the same copy of the decree which is delivered to the Sheriff, as his authority to sell, is to be made part of the roll.

Statutes 1863-4, *p.* 400, *Sec.* 1.

The decree must be supported by the record, or it can not be determined that the Court had jurisdiction, nor what was admitted by the default.

The statement in the Points of defendants in error (p. 12), that the recitals of the jurisdictional facts in the decree are conclusive, is untenable. If the judgment *record* shows jurisdiction of the subject matter, the recitals in the decree will defeat a collateral attack, as to service upon the defendants who are properly made parties to the

suit. But the decree separated from the roll proves no fact as to the jurisdiction.

The Supreme Court of California says:

"The validity of a judgment in a tax suit is to be ascertained by the same tests, has the benefit of the same presumptions, and is subject to attack in the same mode, and by the same means, as a judgment in an action of any other class. The doctrines announced in *Hahn vs. Kelly*, and the cases affirming that case, are applicable without regard to the character of the action in which the judgment was rendered."

Eitel vs. Foote, 39 *Cal.*, 440.

In *Hahn vs. Kelly*, 34 *Cal.*, p. 424, the Court says: "In examining questions of the kind now under consideration, it must always be borne in mind that it is *only the record*, technically so called, that imports absolute verity." And on p. 425 it is said that the roll provided for by Statute is that technical record. And we submit that the State should be held to the utmost strictness, in making up, and parties claiming under it, in presenting this technical record, as no direct attack upon it is allowed as in other cases.

People vs. Talmage, 6 *Cal.*, 258.

IV.

IF THE DETACHED PAPERS INTRODUCED WITH THE DECREE COULD BE TREATED AS CONSTITUTING A JUDGMENT ROLL, IT WOULD NOT SUPPORT THE SALE.

Section 5 *of the Statute* regulating these proceedings (Stat. 1862, p. 522) provides that the publication directed to be made, shall be equivalent to personal service, and shall bind the interest of every owner and claimant thereof, whether named as a party to such action or not. But this must be read in connection with the provisions for making "unknown owners" parties when the assessment is to "unknown owners." (*Stat.* 1863, *p.* 722). This Statute, after giving the form of a complaint, in which it is averred that the property was assessed to the person named as defendant, and that he was then and there *owner*, adds to the section this proviso: "*Provided*, that if the property be assessed to an 'unknown owner,' then any fictitious name may be inserted to represent such owner as defendant."

The form given is for cases where the owner is *known*, and the assessment is made to the true owner. But if the true owner is not known to the assessor, and he makes the assessment, as he may when in doubt as to the true owner (see Stat.

1861, pp. 423–426, secs. 13 and 20), to an "unknown owner," then and only then may such "unknown owner" be sued by a fictitious name; and the publication provided for in section 5 of the Statute of 1862, shall bind the owner whether *named* as a party or sued by a fictitious name. No one can be bound who is not *made* a party, but he may be bound without being made a party by *name*, provided the assessment is made to him as an unknown owner.

By the Statute regulating the mode of making assessments (Stat. 1861, p. 423, &c.), it is provided by sec. 13, that if the owner is not known to the assessor, he may make the assessment to "unknown owners." And if the assessment be so made, it is an assessment against every owner and claimant, and such owner and claimant may be sued by a fictitious name, and so be bound without being named. But if the assessor makes a mistake as to the true owner and names the wrong person as owner, and does not make the assessment to an "unknown owner," there is no authority for making the true owner a party either by name or by a fictitious name, for the suit being based upon the assessment, can embrace no one who is not in some way embraced by the assessment.

In *Eitel vs. Foote*, *p.* 441 (39 Cal.) the Court says: The Statute authorizes the suit to be brought against the owner by a fictitious name, when the property is assessed to an unknown owner (Stat. 1861, p. 721); and the complaint alleges that the real estate therein mentioned was assessed to unknown owners, and to all owners and claimants known and unknown."

The complaint in this case avers (fol. 45) that there was duly assessed to him (R. H. Vance) the land described. At fols. 47 and 48 an extract from the assessment roll annexed to the complaint states that the assessment was to R. H. Vance, but it nowhere appears that the assessment was made to an "unknown owner," or to "all owners and claimants known or unknown," or in any otherwise duly assessed than to R. H. Vance. The assessment could not therefore bind the interest of any one except that of R. H. Vance; nor could the judgment go beyond the averments in the complaint as to the assessment, for the default only admitted the "facts stated in the complaint" (*Stat.* 1862, *p.* 522, *Sec.* 6), and bound no one except parties to the assessment and the suit upon it, either by name or a ficticious name. The suit is against the land to enforce the assessment to persons either by name or as unknown;

and the decree can reach no farther than the assessment goes, in barring the rights of the owner.

It is immaterial whether the deed from Vance to the plaintiff was recorded or not, for it is not made the duty of the assessor to examine the records; nor is the record of a deed made to impart notice to him. If he were governed by the record, there would be no need of authorizing him to assess to an unknown owner, when in doubt as to the true owner.

A conclusive answer to the curative Act referred to at page 6 of defendants' points, is that it was not passed until after the sale had been made, under which they claim.*

V.

THE COURT ERRED IN EXCLUDING THE EVIDENCE OFFERED TO PROVE THAT THE DEFENDANTS HAD BEEN IN THE EXCLUSIVE POSSESSION AND ENJOYMENT OF THE PREMISES IN CONTROVERSY, FROM A PERIOD ANTERIOR TO THE ASSESSMENT, UNDER WHICH THEY CLAIM THE TITLE WAS DIVESTED.

Barrett vs. Amerein, 36 *Cal.*, 322.
Reily vs. Lancaster, 39 *Cal.*, 356-7.
Copenger vs Rice, 33 *Cal.*, 425.

In Reily vs. Lascaster, the Court says, "It is

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* The statute of 1864 (*Stat.* 1863-5, *p.* 235) providing for publication of a notice instead of the summons, had escaped the attention of the counsel who prepared the Points heretofore filed in this case, as it was not referred to by either side at the trial, or noticed by the Court.

well settled in this Court that a party in possession, whose duty it is to pay the tax, shall *derive no advantage* from a sale for the tax which he ought to have paid without a sale. Was it the duty of Butterfield or his grantee to pay this tax, notwithstanding it was *in terms assessed to Ferderer?* Unless Butterfield or Elliott was in possession when the tax was levied or assessed, we apprehend they were under no obligation, either legal or moral, to pay it. It is evident *they had no title*, which rendered either of them amenable to taxation as the *owner* of the property. But we have repeatedly held that possession, with a claim of ownership, is a subject of taxation, and imposes on the *occupant* the duty to pay the tax levied on the *property*."

Section 5 of the Act under which this assessment was made, provides that the term "real estate as used in the Act shall be deemed and taken to mean and include the ownership of, or claim to, *or possession of*, lands. [*Stat.* 1861. *p.* 421.]

The defendants were in possession claiming title, when the assessment was made and the tax levied [see fols. 13, 21, 25. 28 and 32,) and we proposed to prove that they had the exclusive possession and enjoyment of the land when the assessment was made, and had continued such

possession and enjoyment ever since. This offer, we submit, brings the case fully within the cases above cited. But if it were necessary to prove claim of title, in addition to such possession and the averments of their answers, we were not required to prove any more than one fact at a time.

VI.

THE OFFER TO PROVE THAT THE ASSESSMENT WAS NOT LEGALLY MADE OUGHT TO HAVE BEEN ALLOWED.

The decree being made authority to sell before the record is completed, it is contended that it is *prima facie* evidence of the assessment and other matters determined by it, without a complete record, and so the Circuit Court must have held. If this results from the force of the Statute, then the owner of the land must be allowed to overthrow it by showing that its recitals as to the assessment are not true. And the reason for allowing such collateral attack, in the absence of a technical record, is greatly increased by the fact that no direct proceeding is permitted to set aside the decree; no suit being allowed against the State.

People vs. Talmage, 6 *Cal.*, 258.

We respectfully submit that, in any view that may be taken of this case, the judgment of the Circuit Court should be reversed.

HOUGHTON & REYNOLDS,
Of Counsel for Plaintiff in Error.

No. .....

IN THE

SUPREME COURT

OF THE

UNITED STATES.

IRA G. FRENCH,

Plaintiff in Error.

vs.

THOMAS EDWARDS, ET AL.

Defendants in Error.

Abstract, Points and Authorities of Plaintiff in Error.

JOHN REYNOLDS,
Counsel for Plaintiff in Error.

SAN FRANCISCO:
CUBERY AND COMPANY, PRINTERS, 536 MARKET STREET.
1871.

IN THE

SUPREME COURT

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IRA G. FRENCH,
Plaintiff in Error.
vs.
THOMAS EDWARDS, ET AL.,
Defendants in Error.

Abstract, Points and Authorities of Plaintiff in Error.

ABSTRACT OF FACTS.

This is an action of ejectment, for a tract of land in Sacramento County, California—part of

the Sutter Grant, tried before Hon. M. P. Deady, holding the Circuit Court for the District of California.

The answers, though quite lengthy, amount only to the general issue, with a plea of the Statute of Limitations.

Bell vs. *Brown*, 22 Cal. 681.
Marshall vs. *Shafter*, 32 Ib. 190

The plaintiff proved title in himself derived from John A. Sutter, who derived his title by a grant made to him by the Mexican Government, which was finally confirmed and a patent issued to Sutter within five years before the commencement of this action. (Trans. fol. 37.)

It was then admitted that the defendants in error were in possession at the commencement of the action. (Fol. 36.)

The defendants then introduced copies of certain documents, with and to support a Tax deed, which constituted their sole defence. (Trans. fols. 38, 60 and 64.)

These documents were :

First. Copies of papers on file in the District Court for Sacramento County, in the case of *The People, &c.*, vs. *R. H. Vance, et al.*, as follows :

Report of E. B. Crocker, court commissioner, reporting amount of taxes due and form of decree. (Fol. 39.)

An affidavit of the District Attorney annexed to the summons, showing the mode of the service of summons, to wit: by posting a copy and publishing a notice. (Fols. 40 and 44.)

Complaint and exhibits annexed thereto, (being an extract from the assessment roll, with assessor's certificate.) (Fol. 44-48.)

Copy of the decree (order of sale) with sheriff's return thereon, stating that he had sold the land described therein, to L. M. Lincoln, who was the *highest bidder* therefor, for $175.42 with the receipt of the district attorney for $155.40.

These copies were all offered together and covered by one certificate, certifying that each with the endorsement thereon, was a true copy of the original on file, and that all taken together constituted all the proceedings had in the case. (Fol. 53.)

Second. Another copy of the decree with a separate certificate annexed to it. (Fol. 56.)

Third. A certificate of purchase by the sheriff to L. M. Lincoln, following his return. (Fol. 57-8.)

Fourth. The sheriff's deed, based upon these proceedings, and relied on by the defendants to show title out of the plaintiff. (Fols. 60-2.) This deed recites (fol. 61) that the sheriff sold the land to L. M. Lincoln for the sum of $175.42, "*he be-*

ing the highest bidder, and that being the *largest sum* bid for said property at such sale." There is nothing to show how any more than $155.40 of this money was disposed of, nor why it was necessary to sell for more than this sum.

No testimony was offered tending to establish the plea of the Statute of Limitations. (See Statutes of 1855, p. 109, Sec. 1; Limitation Act, Sec. 9.)

Upon this testimony the Court instructed the jury to find a verdict in favor of the defendants, (fol. 65.) To which instruction the plaintiff duly excepted, (fol. 65.)

And also to the several documents as they were offered, the plaintiff objected and duly excepted, (fols. 54-5, 56, 58, and 63.)

All are embodied in a bill of exceptions, signed and sealed by the Judge who tried the cause, (fol. 37-65.)

POINTS AND AUTHORITIES.

I.

The plaintiff proved title in fee and seizin within five years.

Statutes of 1850, p. 344, Sec. 9.
Statutes of 1855, p. 109, Sec. 1.

II.

The Circuit Court erred in the instruction to the jury, because the tax deed relied on is invalid as a defence :

First. The deed is void upon its face. The Statute regulating sales under decrees for the foreclosure of liens for taxes, provides that "The sheriff, in selling said property, shall only sell the smallest quantity that any purchaser will take and pay the judgment and all costs."

Statutes of 1861, p. 435, Sec. 45.

This deed, as well as the sheriff's return, declares that the whole land was sold to the *highest bidder* for $175.42, that being the *largest sum* bid.

Ferris vs. *Coover*, 10 Cal. Rep. 632.
Mayhew vs. *Davis*, 4 McLean, 213.
Culver vs. *Hayden*, 1 Vermont, 359.
Sharp vs. *Johnson*, 4 Hill, 99.
Corwin vs. *Merritt*, 3 Barb. 343.
Atkins vs. *Kinnan*, 20 Wend. 249.
Stead's Executors vs. *Course*, 4 Cranch, 403.
Moore vs. *Brown*, 4 McLean, 211 and 11 Howard, 414.
Farrar vs. *Eastman*, 1 Fairfield, 191.
Hogins vs. *Brashears*, 8 English, 242.

Second. No judgment record was introduced to support the deed. The detached papers introduced did not constitute a judgment record.

Cal. Practice Act, Sec 203.
Statutes of 1863-4, p. 400, Sec. 1.
Statutes of 1863-4, p. 401, Sec. 4.

The judgment record alone imports verity; and unless a complete record is produced, no presumptions can be allowed in its favor.

Hahn vs. *Kelly*, 34 Cal. 391-424, and authorities therein cited.
Eitel vs. *Foote*, 39 Cal. 439.

Third. The decree under which this sale was made is unsupported by the papers introduced for that purpose.

The Court acquired no jurisdiction of the land.

Statutes of 1861, p. 433, Sec. 41.
Statutes of 1862, pp. 520 to 524.
Statutes of 1863-4, p. 399.

The decree is silent as to the mode of service upon the land.

The recital only proves service upon the claimants, not upon the land; and this only when it forms part of the judgment roll. (See Statutes of

1863-4, p. 400, Sec. 1, and cases above cited); and only in proceedings *in rem*, which can only be based upon an assessment against all owners known and unknown.

O'Grady vs. *Barnhusel*, 23 Cal. 287.

Fourth. The certificate attached to the papers introduced, shows that no other proof of service was made than that set out, (fol. 53) which shows an insufficient service.

Statutes of 1862, p. 522, Secs. 5 and 6.

Fifth. If the papers introduced could be treated as a judgment record, without being enrolled, the affidavit of the district attorney, showing how service was made, forming part of the record shows that it was not properly made.

See authorities above cited.
McMillan vs. *Reynolds*, 11 Cal. 372.
Braly vs. *Seaman*, 30 Ib. 610.
Forbes vs. *Hyde*, 31 Ib. 342.

Sixth. The complaint states that the assessment was made to R. H. Vance only—not to unknown owners, and therefore no one but Vance or those claiming title under him, subsequent to the assessment, could be foreclosed. Plaintiff's purchase was two years before this assessment.

Braly vs. *Seaman*, 30 Cal. 610.

Ficticious names can only be used in the suit when the assessment is made to unknown owners.

Statutes of 1863, p. 722, Sec. 2.

Seventh. The deed, with its recitals and all the papers offered to support it, fails to accomplish the purpose sought.

See the authorities above cited, and *Blackwell on Tax Titles*, p. 251, and cases there cited.

III.

The objections to the testimony offered by the defendants should have been sustained. (Fols. 47 and 54.)

Same authorities above cited.

IV.

The evidence offered by the plaintiff in rebuttal should have been allowed.

Moss vs. *Shear*, 25. Cal. 38.

JOHN REYNOLDS,

Attorney for Plaintiff in Error.

In the Supreme Court

OF THE UNITED STATES.

IRA G. FRENCH,
PLAINTIFF IN ERROR,

vs.

THOMAS EDWARDS, ET ALS,
DEFENDANTS IN ERROR.

POINTS AND AUTHORITIES OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This action was brought to recover the possession of a tract of land in the county of Sacramento, State of California, specifically described in the complaint, which is in the ordinary form.

Record, folios 2–5.

Separate answers were filed in behalf of various defendants, the gist of which is substantially, but not with entire accuracy, stated in the brief for the plaintiff in error. Some of the defendants

pleaded the general issue; others interposed the same plea, limited by special averments to particular portions of the tract; and still others added pleas of the statute of limitations and counter-claims for amounts expended in improvements and in the payment of taxes.

Record, folios 8–36.

Brief for plaintiff in error, p. 4.

The cause was tried, and a verdict in favor of defendants rendered April 3d, 1867.

Record, folio 36.

The title of the plaintiff was derived through a deed from Robert H. Vance, dated March 1st, 1862, from John A. Sutter, under a Mexican grant to that gentleman on June, 18th, 1841, and a patent issued on June 20th, 1866. It did not appear that the deed from Vance to the plaintiff had ever been recorded, nor that either of them had ever been in possession of the land.

Record, folios 37-38.

The defendants claimed that the plaintiff had been divested of title through a sheriff's sale, followed by a certificate and deed, under a judgment or decree in favor of the People of the State of California in an action brought to recover delinquent taxes for the fiscal year 1864.

Record, folios 38-64.

The bill of exceptions was signed April 13th, 1867, ten days *after* the trial and verdict, and filed April 16th, 1867.

Record, folios 37-66.

I.

THE BILL OF EXCEPTIONS, NOT HAVING BEEN TENDERED AND SIGNED AT THE TRIAL, FORMS NO PART OF THE RECORD, AND, THEREFORE, CANNOT BE CONSIDERED ON THIS WRIT OF ERROR.

The facts necessary to support this proposition have been already fully stated. The law on the subject is clearly established.

In an early case, which has since been closely followed, the rule was strictly laid down in the following language:

"The bill of exceptions is signed *nunc pro tunc*, and "it purports on its face to be the same as if actually "reduced to form, and signed *pending the trial.* "*And it would be a fatal error*, if it were to appear "otherwise; for the original authority under which "bills of exception are allowed, has always been "considered to be restricted to matters of excep-"tion taken pending the trial, and ascertained be-"fore the verdict."

Walton vs. The United States, 9 *Wheaton*, 651, 657.

Vide, also, *ex parte Bradstreet*, 4 *Peters*, 102–106.

In a later case, the language of the Court is equally emphatic: "The practice is well settled "and exceedingly plain and simple, *and will be* "*strictly adhered to* by the Court."

Brown v. Clark, 4 *How. (Sup. Ct. U. S.)* 15.

In two other cases, the inflexibility of the rule is affirmed; and it may now be regarded as beyond discussion, that a bill of exceptions must purport to be taken and signed during the trial, and that, if not actually so signed, it must appear that the right to have it signed on a subsequent day was preserved at the time by an order of the court, or by a stipulation between the parties.

Sheppard vs. Clark, 6 *How. (Sup. Ct. U. S.)* 275.

Phelps vs. Mayer, 15 *Idem*, 160.

In this cause, the record shows that the rule was not observed, and, for aught that appears, the bill of exceptions was settled and signed *ex parte*, without any notice to the defendants.

II.

THE VALIDITY OF THE ASSESSMENT IS NOT BEFORE THE COURT, AND, IF IT WERE, ITS VALIDITY IS INDISPUTABLE. THE SIXTH POINT OF THE PLAINTIFF IN ERROR, THEREFORE, IS UNTENABLE.

To preserve the logical order of the argument

for the defendants in error, some departures from the numerical arrangement of the points for the plaintiff in error are unavoidable.

1. The statement that the complaint in the tax suit alleged that "the assessment was made to R. "H. Vance *only*" is incorrect. The allegation was that the assessor "did *duly* assess" the property, and afterwards it was averred that Vance was the owner, and that the land was assessed to him, and that "title" and "interest" were claimed by the other "personal defendants."

Brief for plaintiff in error, p. 9.
Record, folios 45, 46.

2. It has already been shown that there was no evidence that the deed from Vance to the plaintiff in error had been *recorded*. On the face of the records of Sacramento County, therefore, the title stood in the name of Vance and the assessment to him was properly made. The law does not require assessors to search among the inhabitants of a State for possible owners of property.

Record, folio 38.

3. But it is respectfully submitted that the plaintiff in error has totally misconceived the scope of the complaint, the force and effect of the decree, and the nature and conclusiveness of the deed. The proceeding which terminated in the

sale of the land was *in rem*, every step in its progress was a *literal* compliance with a *valid* statute, the decree was decisive of every proposition of law and fact it contained, and the deed was *not* the conveyance of a tax collector or other similar officer, but the ordinary result of a sheriff's sale of real property levied upon in an action at law, with the additional quality added to it by the statute of being *conclusive* evidence of title, except in case of actual fraud, and against prepayment of the taxes by an individual not a party to the suit. These propositions, it is believed, will be demonstrated in the course of this argument, and, if they are correct, the question of the validity or invalidity of the assessment is not before the Court.

4. Even if the assessment had been defective, and the point were properly here involved, the answer to the objection would be that, by a special and constitutional act of the Legislature, all defects in the assessment for the fiscal year 1864 were expressly cured.

Statutes of California, 1865–6, *p.* 795.
People vs. Todd, 23 *Cal.* 182.
People vs. Holladay et al, 25 *Cal.* 304.

III.

THE PROCEEDING, IN WHICH THE LAND WAS SOLD, WAS IN REM, AND THE DIRECTIONS OF THE STATUTE, ALL OF WHICH HAVE BEEN FULLY SUSTAINED IN THE STATE OF CALIFORNIA, WERE STRICTLY PURSUED.

1. The proceeding was *in rem.*

Statutes of California, 1862, *p.* 520, *Sec.* 1.

2. The suit was properly brought in the District Court.

Statutes of California, 1863–4, *p.* 399.

3. No objection was made or could have been successfully made to the complaint on the ground that two kinds of action were improperly united, because tax suits could be brought *in personam*, *in rem*, or combining both characters. Therefore the use of fictitious names did not vitiate or affect the complaint in any aspect of the case. But such use was expressly authorized.

Statutes of California, 1863, *p.* 722, *Sec.* 2.

4. The action was against R. H. Vance, John Doe, Richard Roe, *and* the real estate and improvements.

Record, *folio* 44.

5. The statute required the complaint to contain (*a*) separate statements of the amount of taxes

due for State and County purposes; (*b*) the kind and quantity of property assessed, both real and personal; and (*c*) a description of the real property. The complaint fulfilled all these conditions, and was in the *exact* form proposed in a subsequent enactment.

Statutes of California, 1861, *p.* 471, *Sec.* 2.
Record, folios, 45, 46.
Statutes of California, 1863, *p.* 722, *Sec.* 2.

6. It was provided that the summons should contain a description of the property, and that it need not name any particular defendant, but might be directed "to all owners of the property described." The description in the summons here in question was very specific, and the language quoted was literally inserted.

Statutes of California, 1862, *p.* 520, *Sec.* 1.
Record, folios, 41, 42.

7. The service of the summons was duly made.

(a) When the complaint was verified (as here) in a certain form by the District Attorney, no order for publication was required.

Statutes of California 1862, *p.* 522, *Sec.* 4.
Record, folio 47.

(b) The *manner* of service was not to be as prescribed by the acts of 1861 and 1862, but by posting a copy of the summons, and publishing a notice for eight weeks.

Statutes of California 1863–4, *p.* 235, *Sec.* 1.

(c) And such service was *equivalent* to personal service, *whether the owner or claimant was named as a party or not.*

Statutes of California 1862, *p.* 522, *Sec.* 5.

Statutes of California 1864, *p.* 235, *Sec.* 1.

(d) And the fact of service was to be proved by the affidavit of the District Attorney.

Statutes of California 1864, *p.* 235, *Sec.* 1.

(e) The summons was served, and proof of service made, as directed by the statute.

Record, folio 40.

(f) And the service gave to the Court in which the suit had been commenced full jurisdiction over the *land*. "We do not deem it necessary," said the Supreme Court of the State of California in a late case, and referring to the very statute in question "to discuss the constitutional question " presented by the defendant. The power of the " Legislature to provide for constructive service " of process has so often been exercised, and the " validity of such service has so frequently been " recognized, both directly and indirectly by the " Courts of this State, as well as those of most " of the States of the Union, that it may be re- " garded as beyond the reach of attack on con- " stitutional grounds."

Eitel v. *Foote*, 39 *Cal.* 441.

8. After the expiration of forty days beyond

the period of eight weeks, during which the notice was published, the defendants were defaulted, and the cause referred to the Court Commissioner, whose report was duly made, by operation of the statute, and without entry of default or of any motion or order.

Statutes of California 1863-4, *p.* 399, *Sec.* 1.
Record, folios 39, 40, 49.

9. The draft of the decree was to be reported by the Court Commissioner, to show the amount of taxes due, the amount of attorneys' fees, and the amount of other costs, and, when signed by the Judge, either in term or at chambers, to constitute the judgment of the Court. It was only necessary for the decree to recite that all owners and claimants had been duly summoned to answer the complaint, and had made default, and the recital was "*proof of those facts.*" All this was done.

Statutes of California 1863–4, *pp.* 399, 400, *Sec.* 1.
Record, folios 49–52.

10. A certified copy of the decree, containing the instruction to sell the land, was sufficient authority to the sheriff, and was to be (and was) executed and returned by that officer.

Statutes of California 1863–4, *p.* 400, *Sec.* 1.
Record, folios 51, 52.

11. A notice of sale, to be published by the Sheriff for three weeks, was provided for. The notice was given and published "according to law," that is, in conformity with the statute, and the sale regularly made.

Statutes of California 1862, *p.* 523, *Sec.* 7.
Record, folio 51.

12. Where not otherwise prescribed, the proceedings of the sheriff were regulated by the Civil Practice Act, in obedience to which a certificate of sale was made containing a particular description of the land sold, the price bid, the whole price paid, and a statement that the property was subject to redemption. This certificate was followed by a deed properly executed.

Statutes of California 1861, *p.* 471, *Sec.* 5.
Practice Act of California, *Secs.* 229, 232.
Record, folios 57–59, 60–64.

IV.

THE STATUTORY PROVISIONS APPLICABLE TO THE SUBJECT, AND THE FACTS DISCLOSED BY THE RECORD, HAVE BEEN CRITICALLY COMPARED, IN ORDER TO PROVE THAT, UNDER THE STRICTEST RULE OF CONSTRUCTION, AND WITHOUT INDULGING ANY PRESUMPTION IN THEIR FAVOR, THE PROCEEDINGS IN THE SIXTH DISTRICT COURT WERE IMPREGNABLE TO ATTACK. BUT THOSE PROCEEDINGS, LIKE THE ASSESSMENT, ARE NOT BEFORE THE COURT. THE DECREE CONTAINED A RECITAL OF THE REQUISITE JURISDICTIONAL FACTS, AND BY THE EXPRESS TERMS OF THE STATUTE, UPON WELL ESTABLISHED PRINCIPLES OF LAW, AND UNDER THE VERY AUTHORITIES CITED BY THE PLAINTIFF IN ERROR, WAS CONCLUSIVE ON EVERY POINT REQUISITE TO JUSTIFY THE SALE.

1. A copy of the decree, *separately certified*, was put in evidence.

Record, folios 55, 56.

2. It has already been seen that the summons was directed "to all owners of the property "described." The decree recited that all owners and claimants "of the property" * * "described," had been "duly summoned to answer the com-"plaint," and had "made default in that behalf." This recital was "*proof* of those facts," and there-

fore conclusive under the statute. It was also conclusive irrespective of the statute.

Record, folio 49.

Statutes of California 1863–4, *pp* 399, 400, *Sec.* 1.

3. This is a *collateral* attack upon the decree. In one of the cases cited by plaintiff in error, the attack was direct; namely, by a bill in equity to set aside as *fraudulent* a deed of land made by a collector of taxes, and the question was as to the sufficiency of the defendant's plea. A similar case has been decided in the State of California.

Stead's Executors v. *Course*, 4 *Cranch*, 403.

Brief for plaintiff in error, p. 7.

Hibernia Savings and Loan Society vs. *Ordway*, 38 *Cal.* 680–683.

4. The judgment roll, or papers in the record, contains nothing that contradicts the recital in the decree, even if the statute permitted such contradiction. On the contrary, service upon and jurisdiction over the land, properly made and acquired, have been fully shown, apart from the decree, and thus the third, fourth and fifth points of the plaintiff in error, if they could be considered at all, are fully answered and the authorities cited, especially those under the fifth point, have no application.

See Point III of this Brief.

Brief for plaintiff in error, pp. 8, 9.

5. But the authorities cited under the second point of the plaintiff in error *are* directly applicable, and quite conclusive—against himself. There being no conflict, as has been proved, between the decree and the judgment roll, even though papers were missing that related to the question of jurisdiction, and should have formed part of that record, and wholly ignoring the force given to the decree by statute, the recital was conclusive, and in a collateral proceeding, neither the assessment nor any step in the action to collect the tax could be impeached. The rebutting evidence, therefore, offered by the plaintiff in error was properly rejected.

Record, folio 64.

Brief for plaintiff in error, p. 10.

Hahn vs. *Kelly*, 34 *Cal.* 402, 419, 420, *and see also brief for appellant, citing* 126 *cases, pp.* 398–401.

"The plaintiff relies upon a sheriff's deed executed in pursuance of a sale made under a decree of the District Court, which ordered the property in controversy to be sold for the payment of taxes. The defendant insists that the decree is void for the want of jurisdiction either of the defendant or of the land sought to be charged with the payment of the taxes, and, for authority, reliance is mainly placed on *Mayo* v. *Ah Loy*, (32 *Cal.* 477). That case was tried in

" the District Court long before the decision was " rendered in *Hahn* v. *Kelly*, (34 *Cal.* 402), and " when the rules as to the manner in which a judg- " ment might be collaterally attacked, were not " as well settled in the Courts of this State, as " they are at this time."

* * * * * * * "*The validity of a judgment in a* " *tax suit is to be ascertained by the same tests, has the* " *benefit of the same presumptions, and is subject to* " *attack in the same mode, and by the same means, as* " *a judgment in an action of any other class.*"

* * * * * * * "The assessment roll which was " introduced in evidence by the defendant in this " case, might have tended to show, *had it been in-* " *troduced on the trial of the tax suit*, that the taxes " were not legally assessed; *but it is entitled to no* " *weight whatever, in a collateral attack upon the judg-* *ment.*"

Eitel v. *Foote*, 39 *Cal.* 440, 441.

"This action is to recover a lot in the City of " Sacramento, and the plaintiff deraigns title by " regular mesne conveyances from John A. Sutter, " to whom the land was granted by the Mexican " Government, and to whom it has been finally " confirmed and patented. The defendants are " the tenants of one Elliott, who was permitted " to defend for them, and who sets up title in " himself under certain sales for taxes and sher- " iff's deeds in pursuance thereof. The validity

" of the titles thus acquired is the principal " question arising on this appeal. In support of " the defense, there is offered in evidence the " complaint, summons, affidavit constituting proof " of service, and Commissioner's report in the case " of *The People* v. *Wm. Firderer* and the west " half of the lot in contest in this case, and also " the decree, and order of sale issued thereon, " together with the sheriff's return, all which " were objected to by the plaintiff as incompetent " evidence; but they were admitted by the court, " and thereupon the court also admitted in evi- " dence, against the objection of the plaintiff, a " sheriff's deed to Elliott for the west half of " said lot, founded on said proceedings, which " deed was made pending the action, after the " answer was filed, and but one day before the " trial. It appears, from these proceedings, that " the action was commenced against William Fir- " derer, as the owner of the west half of the lot, " to whom it was assessed, *and also* against the " west half *in rem*. But, in the summons which " was published, the name of Firderer is omitted, " and the plaintiff claims that the omission is fatal " to the judgment, the Court having acquired no " jurisdiction of the proceeding, because of the " failure to serve the owner to whom the property " was assessed. The judgment, however, recites " that it appeared to the satisfaction of the court

" 'that all owners and claimants of the property
" 'above described have been duly summoned to
" 'answer the complaint herein, and have made
" 'default in that behalf,' and this recital brings
" the case fully within the case of *Hahn* v. *Kelly*,
" (34 *Cal.* 391). The judgment, in this respect,
" cannot be impeached in a collateral action. We
" must presume the Court had sufficient proof of
" the service on Firderer, though it does not
" appear in the judgment roll."

Reily v. *Lancaster*, 39 *Cal.* 355, 356.

The three last authorities cited, two of them taken from those relied on by the plaintiff in error, are conclusive, not only on the question of the validity of the decree, but of the whole case. The last case and this in the matter of the tax sales are not only similar, but in nearly every particular identical. The plaintiffs and defendants had the *same* titles, derived from the *same* sources, and in the *same* manner. The *same* kind of testimony was offered and received under *similar* objections. The suits for the collection of taxes, were brought in the *same* Court, and were precisely alike. The recitals in the decrees were identical. The only difference was that the record here contains proof of due service of the summons, which in *Reily* v. *Lancaster*, was omitted. Probably the deeds were of the same form and executed by the same sheriff, but the objection upon which

this Court is now invited to pass does not appear to have occurred to counsel or the court in *Reily* v. *Lancaster*.

V.

THE RECITALS IN THE SHERIFF'S DEED TO LINCOLN HAVE BEEN MISINTERPRETED BY THE PLAINTIFF IN ERROR, AND SHOW EXACT COMPLIANCE WITH THE STATUTE. EVERY PRESUMPTION IS IN FAVOR OF THE DEED, WHICH WAS MADE AS THE RESULT OF AN ACTION AT LAW AND BEARS NO ANALOGY TO A CONVEYANCE BY A TAX COLLECTOR. EVEN AS TO TAX COLLECTORS' DEEDS, THE RULE OF STRICT CONSTRUCTION HAS BEEN ABROGATED BY STATUTE IN THE STATE OF CALIFORNIA, AND IN OTHER STATES, AND BY EXPRESS ENACTMENT, THE DEED NOW UNDER CONSIDERATION, EVEN WERE ITS RECITALS FALSE, OR DID THEY SHOW AN ERROR IN THE MANNER OF MAKING THE SALE, IS CONCLUSIVE EVIDENCE OF TITLE AGAINST THE PLAINTIFF. BUT THE RECITALS ARE NOT FALSE AND DISCLOSE NO ERROR, AND THEY WERE UNNECESSARY, AND ARE IN NO RESPECT BINDING. THE PRESUMPTION IS THAT THE SHERIFF DID HIS DUTY, IN THE ABSENCE OF PROOF TO THE CONTRARY, AND, IF HE FAILED IN ANY RESPECT, THE REMEDY IS BY AN ACTION ON HIS OFFICIAL BOND. MOREOVER, ACCORDING TO THE AUTHORITIES REFERRED TO UNDER THE NEXT PRECEDING SUBDIVISION OF THIS

BRIEF, THE DEED CANNOT BE COLLATERALLY ATTACKED, AND THE ATTACK HERE IS COLLATERAL.

1. The proposition of the plaintiff in error is, that the deed is void, because it shows that the smallest quantity of land that any purchaser would take and pay the judgment and costs, was not sold.

Brief for plaintiff in error, p. 7.

2. In the first place this proposition is based upon a gross misinterpretation of the deed itself. The decree ordered the sale to be made "in ac- "cordance with the statute." The certificate of sale correctly interprets this instruction; and declares in effect that the sale conformed to the statute. The deed refers to the decree and order of sale, and to the sale itself as described in the certificate, and all these papers, if necessary, are to be read together. Now, the order of sale referring to the statute, the certificate stating that the "smallest quantity" that any purchaser would take was to be sold and describing the sale that was made under that direction, the deed referring to the order of sale as the source of the sheriff's authority and correctly limiting the quantity of land to be sold to "so much" as might "be neces- "sary," and every presumption being in favor of the regularity of the sheriff's action, what is the fair and natural construction of the words "highest "bidder" and "largest sum bid" in the deed? The

answer is obvious—construction is scarcely necessary. The "highest bidder" was the man who offered to pay the judgment and costs for the least quantity of land, and "the largest sum bid" was the amount of the judgment and costs in connection with the least quantity of land, in other words, the sum which involved the highest appraisement of the value of the tract purchased.

Record, folios 51, 57, 58, 60, 63.

The fact that no bid for less than the whole of the land appears to have been received, has no force. It was only necessary for the sheriff by advertisement and at the time, to state the terms and conditions of sale. He was not required to begin by offering a lineal inch or any other minute portion of the land, and gradually increase the quantity offered until he obtained a bid. This would be absurd, and the law never exacts an absurdity.

3. In the second place, the authorities cited for the plaintiff in error are founded upon diverse statutes and circumstances, and none of them, as a very slight examination will prove, touch the proposition under discussion. *Corwin vs. Merritt*, 3 *Barb.* 343, and *Atkins vs. Kinnan*, 20 *Wendell*, 249, were not tax cases, and in connection with *Culver vs. Hayden*, 1 *Vermont*, 359, and *Sharp vs. Johnson*, 4 *Hill*, 99, refer to dissimilar facts, and as-

sert the general rule of strict construction, which has no bearing upon the deed here in controversy. In *Ferris vs. Cooper*, 10 *Cal.* 395, the *tax* deed, which was then only *prima facie* evidence of title, contained an *extract* from the assessment book, which proved that the property had not been assessed to the owner or occupant, or to an unknown owner, and it also appeared (*pp.* 632, 633) that there had been no listing or valuation of the property by the assessor. In *Mayhew vs. Davis*, 4 *McLean* 220, 221, 215, the question arose upon a statute of Illinois which enumerated what facts were to be regarded as *prima facie* and what as *conclusively* proved by the sheriff's deed, and, among them, a *demand* by the collector of taxes was not included. The validity of the statute was conceded by Judge Leavitt, whose decision turned on the omission of the demand, and, even then, he unwillingly overruled previous decisions by the Supreme Court of Illinois. In *Moore vs. Brown*, 11 *Howard, Sup. Ct. U. S.* 428, 432, the tax deed was *conceded* to be void, because it showed on its face that the sale was made *earlier* than was authorized by the statute of Illinois, and its admission as evidence was proposed to lay the foundation for the defence of the statute of limitations. Judges Taney, Catron, and Grier, however, dissented from the decision that the deed should be rejected. None of these cases strengthen the position of the plaintiff in

error. They are not analogous in the facts, and they do not even approach the point which has been so desperately suggested in his behalf. It is strange that no precedent for his objection to the deed can be found, especially when the exact opportunity undoubtedly existed in Reily v. Lancaster.

4. In the third place, the deed was the result of a suit, and, as against the plaintiff was not *primâ facie*, but *conclusive* evidence of title. The language of the statute is: "and any deed derived from a "sale of property under this act shall be *conclusive* "evidence of title, except as against actual frauds "or prepayment of the taxes by one not a party "to the action or judgment in or upon which such "sale was made." There is no charge of fraud, actual or constructive, in this case, and of course the plaintiff is not within the second clause of the exception.

Statutes of California, 1861, *p.* 435, *Sec.* 45.
Statutes of California, 1865–6, *p.* 607, *Sec.* 1.

5. The presumption in favor of the regularity of the sheriff's proceedings, and the effect to be given to the language last above quoted, may be illustrated and enforced by a few opposite references.

An Ohio statute made tax deeds *primâ facie* evidence of title. Judge Leavitt, whose jealousy of

this class of conveyances was conspicuously exhibited in the Illinois case above cited, after quoting and commenting upon a number of cases in the Ohio reports, held that the statute, as interpreted by the Supreme Court of that State, gave to the deed of an *Auditor* "without extrinsic "proof" the effect of *primâ facie* evidence of title, that every presumption was in its favor, and that "its "reception, throws upon the party resisting the "tax title the burden of impeaching it by proof "that the prior proceedings were not in accord-"ance with the statute." So that, if the statute of California had made the deed here only *primâ facie* evidence of title, and if it had been introduced without extrinsic proof, the burden of disproving its validity would have rested upon the plaintiff in error.

Lamb's Heirs vs. Gillett, 6 *McLean*, 369, 373, 375, 380, 381.

A similar statute of Arkansas was fully sustained ed, and its interpretation by the Supreme Court of that State adopted, by this Court.

Thomas vs. Lawson et al, 21 *How. Sup. Ct. U. S.* 338, 339-343.

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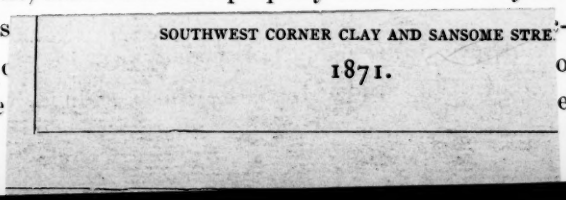

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of California sustained them, and held that the effect of the statute was to shift the burden of proof, that its object was to prevent tax sales from being "a "mockery," and should be promoted by the Courts, and that the deed need not contain recitals, *other than those specified in the act.* In this case, the act did not require recitals, although in fact they were fully inserted.

O'Grady vs. Barnhisel, 23 *Cal.* 291–293.
Wetherbee vs. Dunn, 32 *Cal.* 107.

I submit that, on this record, the assessment, though not in question, was properly made; that all the proceedings were literally exact; that the judgment record is sufficient, and the decree conclusive; that the sale by the sheriff was properly made, and his certificate and deed properly executed and neither void nor irregular; and, that, as a consequence flowing from these premises, there was no title in the plaintiff in error when this action was commenced, and that the judgment of the Circuit Court should be affirmed.

Dated San Francisco, August 5th, A. D., 1871.

DELOS LAKE,
Counsel for Defendants in Error.

E. Casserly
of counsel

No. .....

In the Supreme Court

Of the State of California.

IRA G. FRENCH,
PLAINTIFF IN ERROR,

VS.

THOS. EDWARDS ET ALS.
DEFENDANTS IN ERROR.

POINTS AND AUTHORITIES OF DEFENDANTS IN ERROR.

DELOS LAKE,
COUNSEL FOR DEFENDANTS IN ERROR.

MAHON, RAPP, THOMAS & CO., LAW PRINTERS,
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